Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

October Term, 1998

JANE P. KREISHCER, CHARLES F. KREISCHER, EDWIN F. KREISCHER and BARBARA W. KREISCHER,

Petitioners,

v

THE KERRISONS DRY GOODS COMPANY, EDWIN F. POULNOT, III, DALE POULNOT WIDMAN, GENE POULNOT RIGGS, DAVID LAWRENCE POULNOT and JOAN HUTCHESON POULNOT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

JAMES S. OWENS, JR.
Counsel of Record
J. ROBERT HOWARD
JAY PONTRELLI
Nall, Miller, Owens,
Hocutt & Howard, LLP
Sixty-Six Luckic Street
Suite 200
Atlanta, Georgia 30303
(404) 522-2200
Attorney for Petitioners

Curry & Taylor Appellate Service (202) 393-4141/appellate@worldlynx.net

120PY

QUESTIONS PRESENTED

I. Whether the business judgment/majority rule in a corporation trumps everything--including fiduciary duty, the duty not to act oppressively, accountability of the majority as management, and the duty of fair dealing?

II. Whether the following constitutes oppression, lack of good faith or other breach of duty by the majority/management:

(i) concealment of assets and information from the minority directors;

(ii) adverse attitude against economic return for the minority;

(iii) pressing the minority to surrender voting rights incident to their stock for an unreasonable annual sum, in times of massive losses, while concealing anticipated and later received windfall Hurricane Hugo insurance proceeds; and

(iv) unreasonable persistence in losses with no way out for the minority while the majority surreptitiously makes plans for development of corporate real estate for themselves?

III. Whether (i) judicial exoneration of defiance of corporate laws, pervasive concealments, and misrepresentations to the Board and Court by local corporate management and (ii) absence of judicial interest in false sworn testimony by corporate fiduciaries on every subject matter, are grounds for recusal of the Trial Judge and equitable relief?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Citations iv

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 2

I. Judicial Abuse And Epic Oppression 2

II. District Court's Liability Ruling - Phase I 4

III. Diary Admissions 7

IV. Flim Flam 7

V. Fourth Circuit Errors Of Law 11

VI. The Fourth Circuit Affirmed Outrageous Events That Occurred Pre-Ruling In The District Court 17

VII. Post-Ruling Not Interested in Law or Facts or Interim Equity 19

VIII. Misrepresentation and Concealment of Real Estate Offers in 1995 20

IX. Judge Ignores and Exonerates Fraud Upon Court 22

X. Motion For Recusal Denied 23

XI. During Another Delay, Petition For Mandamus Stimulates Vindictive Ruling For Prevailing Party In Equity 23

XII. Other Major Errors of Corporate Law By The Fourth Circuit 24

XIII. Reasons For Certiorari: Errors Of Law Applied To Major Events 26

Conclusion 30

Appendix

Appendix D - January 26, 1999 Opinion of the Fourth Circuit 1a

Appendix A - May 1, 1995 Order of the District Court 32a

Appendix B - January 28, 1997 Order of the District Court 63a

Appendix C - May 12, 1997 Order of the District Court 75a

Appendix E - February 22, 1999 Denial of Petition for Rehearing 80a

Appendix F - South Carolina Code §33-8-300 ..... 82a

Appendix G - South Carolina Code §33-8-420 ..... 83a

TABLE OF AUTHORITIES

Page

Cases

Alyeska Pipeline Service Co. v. Wilderness Society,
421 U.S. 240 (1975) 16

Anthony v. Padmar,
465 S.E.2d 745, 753 (S.C. App. 1996) 26

Baker v. Mut. Loan Inv. Co.,
50 S.E.2d 692 (S.C. 1948) 25

Bonavita v. Corbo,
692 A.2d 119, 128 (N.J. Super. 1996) 15

Chambers v. Nasco, Inc.,
501 U.S. 32 (1991) 16

Gilbert v. McLeod Infirmary,
64 S.E.2d 524 (S.C. 1951) 14, 25

Halbersberg v. Berry,
394 S.E.2d 7, 13 (S.C. App. 1990) 25

Hazel-Atlas Glass Co., v. Hartford- Empire Co.
322 U.S. 238 (1944) 24

Hendley v. Lee,
676 F.Supp. 1317, 1324 (D.S.C. 1987) 15, 28

In Re PTL,
92 B.R. 1000, 1015 (D.S.C. 1988) 25

Jacobson v. Yaschik,
249 S.C. 577, 155 S.E.2d 601, 604
(S.C. 1967) 26

Lawson v. Rogers,
435 S.E.2d 853, 857 (S.C. 1993) 26

Lietky v. U.S.,
1145 S.Ct. 1147 (1994) 25

Mills v. Electric Auto-Lite, Co.,
396 U.S. 375, 395 (1970) 16

Mortimer v. McKeithan Lumber Corp.,
120 S.E. 723 (S.C. 1923) 25

Olin Mathieson Chemical Corp. v. Planters Corp.,
114 S.E.2d 321, 326 (S.C. 1960) 25

Pepper v. Litton,
308 U.S. 295, 306 (1939) 14, 26

Segall v. Shore,
269 S.C. 31, 236 S.E. 2d 316 (1967). 25, 26

Southern Pacific Company v. Bogart,
250 U.S. 483 (1919) 14

Sugarman v. Sugarman,
797 F.2d 3 (1st Cir. 1986) 16

Talbot v. James,
259 S.C. 73 S.C. 190 S.E.2d 759 (1972) 14, 26

Tower Hill-Connellsville Coke Co. v. Piedmont Coal Co., 64 F.2d 817, 825-27
(4th Cir. 1933) 15, 28

WLR Foods, Inc. v. Tyson Foods, Inc.,
65 F.3d at 1184-85 ..... 12, 13

Weinberger v. UOP, Inc.,
457 A.2d 701 (Del. 1983) 14

Other Authorities

C. Van Swearingen, *Fletcher Cyclopaedia the Law of Private Corporations*, §5811.10 (Perm. Ed. 1984) 26

F. H. O'Neal, *Oppression of Minority Shareholders* §§7.13, 9.04 (1975) 16

Statutes

28 U.S.C. §1254(1) 1
S.C. Code §33-8-300 ..... 1, 11, 13
S.C. Code §33-8-420 ..... 1, 11, 13

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is an unpublished opinion that may be found at 1999 WL 30836 (1a-31a). The Opinions and Orders of the District Court, dated May 1, 1995, January 28, 1997 and May 12, 1997 are unpublished and unreported (32a-79a). The Fourth Circuit order filed February 22, 1999 denying rehearing is unreported. (80a-81a).

STATEMENT OF JURISDICTION

This is a Petition to review a decision of the United States Court of Appeals for the Fourth Circuit entered on January 26, 1999. A timely Motion For Rehearing was filed with the Court and was denied on February 22, 1999. This Petition For Writ Of Certiorari is filed within ninety (90) days of the Final Judgment. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

S.C. Code §33-8-300 (82a)

S.C. Code §33-8-420 (83a)

STATEMENT OF THE CASE

I. Judicial Abuse And Epic Oppression

This case is extraordinary for the judicial abuse and oppression inflicted under the aegis of the Federal Courts. This Honorable Court must grant Certiorari because of the District Court's total departure from the accepted and usual course of judicial proceedings, which departure was sanctioned by the Court of Appeals. Laws were uniformly ignored and defiance of law tolerated, including pervasive concealment of information and assets, false sworn testimony by local corporate fiduciaries, years of delay in rulings in times of massive unsensible losses and rulings that are the opposite of equity and law. The District Court held in effect that majority rule in a corporation trumps everything--including fiduciary duty and the duty not to act in oppressive ways. Based on that error, every corporate law was ignored or misapplied. The Fourth Circuit erroneously affirmed. The minority as "prevailing party" was presented with an equitable award that was a small fraction of the minority's fees and expenses of litigation and one that results in unjust enrichment of the local Defendants who had unlimited access to the corporate corpus for fees and expenses. That award was premised upon the unusually low values urged by the majority at the valuation trial, while the majority concealed, and misrepresented the non- existence of, offers of much higher values from the Board of Directors and the Court.

The case originated from a corporate squeezeout in which the majority shareholders pressed the minority to surrender their voting rights for an annual sum the District Court found unreasonable, in circumstances of known massive losses, but concealed windfall Hurricane Hugo insurance proceeds. The minority started the suit to remedy oppression and preserve assets. Oppression, waste, deceit, and the refusal of

the majority to propose any means of exit or economic return--plus the insistence that the minority surrender their voting rights--mandated this suit. Oppressive rulings by the District Judge transcended the corporate oppression that preceded the litigation to convert a case where all facts and law favored the out of state party into a an eight-year equitable horror, the apotheosis of "home cooking," where the Judge shielded the local Defendants from the law. The tremendous waste and oppression that preceded this action paled in comparison to that which occurred during this litigation. The case was epic in length and content with rampant corporate abuses uncovered, including misrepresentations and false swearing by the majority on every subject matter to conceal or advance self-dealing. The District Judge found no breach of fiduciary duty or wrongdoing, and the Fourth Circuit affirmed every ruling. Huge legal rights and remedies hinged on the application of the law, including damages, reimbursement of fees and expenses. The case is analogous to a trustee who is permitted to use the corpus to crush the beneficiary and shield the trustee's self-dealing and conversion of the corpus to his own use. Under these circumstances, this Honorable Court should exercise its supervisory powers.

The Trial Judge was C. Weston Houck. The majority shareholders, inclusive of management and a majority of the Board of Directors, are referred to as "Poulnots" or the "majority." The majority's counsel also represented the corporation and is sometimes referred to as "corporate counsel." The minority shareholders, inclusive of a minority of the Board of Directors (not in management), are referred to as "Kreischers" or the "minority".

II. District Court's Liability Ruling - Phase I

On May 1, 1995, the District Court issued its findings of fact and conclusions of law, which included the following:

1. the majority had failed to advise the minority of the windfall Hugo insurance while urging the surrender of their voting rights for an unreasonable sum, which the Court deemed "probably" legal. (App. 56a and 57a).

2. the majority regularly consciously failed to keep the minority, who were directors, advised of important affairs of the company, which the Court deemed lawful. (App. 42a-43a).

3. the majority had "an attitude" "that makes it extremely unlikely that they ever intend to fairly compensate the minority for their interests in Kerrisons"--which the Court deemed "probably" legal. (App. 57a).

4. Contrary to the majority position that business was good and that management knew what they were doing, the Court found that the majority shareholders and directors had no reasonable or sensible plan to deal with the losses (App. 50a, 60a), that they saw "no way to turn the business around" (App. 50a). The Court found that the majority offered no prediction of improvement in the future, and that "they seem determined to stay the course even if it means the financial ruin of the company." (App. 50a). The Court later called the majority's actions"reprehensible" and noted that the evidence supported the conclusion that they were "dissipating the whole company and throwing it away." (7/7/95 Tr., P. 239, ll. 7-10).

During the period from January 1, 1987 until July 2, 1996 the company suffered net operating losses of $6,162,891 set forth in the corporate financial statements as follows:

FYE 1/31/87	$ 269,000
FYE 1/31/88	$ 330,751
FYE 1/31/89	$ 603,943
FYE 1/31/90	$ 754,525
FYE 1/31/91	$ 786,525
FYE 1/31/92	$ 420,752
FYE 1/31/93	$ 402,149[1]
FYE 1/31/94	$ 930,928
FYE 1/31/95	$ 787,437
FYE 1/31/96	$ 684,906
Period 2/1/96 - 7/2/96	$ 191,975
TOTAL	$6,162,891

(Losses thereafter unknown)

5. The minority had suffered a "wrong" and had no way out except through judicial relief. (App. 60a, 61a). The Judge refused to call the situation a "squeezeout"-- notwithstanding persistent concealments, hostile attitude against any economic return, massive losses and no way out.

6. The Court acknowledged numerous forms of compensation to the majority that had been undisclosed and unapproved by the Board of Directors and whose nonexistence had been misrepresented in advance of discovery and proof by the minority shareholders. The Court ignored the misrepresentations and false sworn testimony and expense of exposure and proof of such matters.

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[1] The Court's May 1, 1995 Order is limited to losses through January 31, 1993 and fraction of year thereafter.

7. Due to misrepresentations by the majority as to the shares outstanding, the ownership and the status of the corporate records, numerous badges of fraud in the stock records, including dual lists of stock ownership, fabricated bogus memoranda in the name of a lawyer to compel stock transfer to management, letter of the corporate accountant edited by corporate president to hold forth the lure of corporate money to induce gifts of stock, the District Judge admitted "considerable confusion" in corporate records, but resolved all discrepancies in favor of the majority, who kept such records. (App. 48a). The Court awarded missing shares to an Estate (of which the minority shareholder is a beneficiary), but ignored the false sworn testimony by management related to such shares and their later wrongful claim of ownership.

In spite of copious instances of false sworn testimony (which were expressly and tacitly acknowledged by District Court findings to the contrary), the lower courts refused to find any breach of duty, as a matter of law, even though every action of the Poulnots, as a matter of fact, has been in absolute defiance of corporate law: 1) persistent concealment of information and assets from minority shareholders; 2) concealment of windfall monies while urging surrender of voting rights; 3) an attitude against fair economic return for the minority; 4) the Poulnots' unreasonable insistence upon losses; 5) monies taken without disclosure or approval by the Board of Directors; undisclosed and unapproved use of cash and absence of records; 6) use of corporate money to induce gifts of stock and the use of corporate position for self-dealing; 7) misuse of professionals for self-dealing; 8) fabrication of legal memorandum; 9) vendetta oath to fight the minority every step of the way; 10) no way out; 11) hiding offers and opportunities, and misrepresentations to the Board of Directors (discussed hereafter); and 12) pervasive untruthfulness and arguing for every discount and disadvantage upon the minority's interest.

III. Diary Admissions

The diaries of the majority shareholder were produced on the eve of trial and disproved the Majority's litigating position on many points, including confession that business was not good and that they did not know what to do, that they knew the future was dire and uncertain, that they wilfully concealed the Hugo insurance proceeds, that they had no intention of giving the minority any right they did not already have in the surrender of voting rights offer, that the minority shareholders were referred to as the "enemy" and that the Majority planned to fight the minority every step of the way and they do not know the fight they are in for — expressed before the minority even knew there was a fight. The District Court acknowledged the truth in the diaries through its findings, including several direct quotes therefrom, but ignored the contradictory false testimony and litigating positions that preceded such findings.

IV. Flim Flam

Flim flam administration of this case forced the minority to bear the oppression, time and expense of addressing management's shifting false stories. It is flim flam to fail to apply the tests of "good faith" and "fairness" to majority/management's false sworn testimony on every subject matter and adopt the truth but ignore the wrong that preceded it. The minority attempted to exact true, complete and honest responses from management; instead, they faced patently false statements and litigating positions at every turn. The minority continuously advised the Court of their journey of ultimately exposing the truth that the majority denied and falsely represented. In this way, judicial mismanagement circumvented equity and justice. The Judge's findings of fact and later admissions refute the false sworn testimony of the majority (including responses in their Answer, written discovery

responses, depositions and at preliminary hearings on every subject matter):

We (Poulnots) did not conceal insurance	False
Offer was reasonable.	False
Business is good. We know what we are doing. Liquidation does not enter our minds.	False
We did not conceal any information from the Kreischers. They are fully informed.	False
We are looking after their interests and all shareholders' interests.	False
This is all we make.	False
There are no 1099s for extra income.	False
No family member takes cash.	False
No personal expenses are run through the company.	False

From the reconstruction of audit-proof financial records; The CPA who preceded the current one, confirmed in deposition, personal expenses run through the company, as did notes of many prior CPAs, plus several successive comptrollers. Followed by reluctant admissions, including of cash taken and checks written during litigation to repay the company.

The Estate owns no stock (and Jane Kreischer owns no extra stock).	False

All stock records were lost. False

Only 530 shares outstanding. False

This power of appointment is the source of my stock. False

I knew nothing about the proposed donations of stock. False

The consulting contract had nothing to do with the donations. False

Denial of any connection with the fabricated legal memorandum. False

LATER, true authority for most transfers and receipts uncovered.

Poulnots claim beneficial ownership of 10 shares. False

EH Poulnot, Jr., (common ancestor and predecessor stockholder) thought he owned 200 shares in 1983, which was admitted by EHP, III (President and one of the majority) and numerous memoranda indicate EHP, III, affirmed such ownership of 200 shares in 1983. False

> *In this action, EHP, III (President), swore that E. H. Poulnot, Jr. owned only 170 shares from 1980, as shown by the stock book. He swore no backdating, but considerable evidence to contrary.*

Reconstruction of Stock Records. False

Numerous inconsistencies in corporate records regarding stock, including missing 10 share certificate to Jane Kreischer, two inconsistent lists of stock ownership, numerous tax returns showing stock ownership inconsistent with stock book, memorandum showing that EHP, III (President) planned to take control of company with professional help at the expense of the corporation, and fabricated version of same memorandum in the name of the lawyer to induce gifts of stock and editing corporate accountants' letter to induce gift of stock with promise of corporate money.

Poulnots represent in Board meeting and in Court no offers and no interest in real estate in advance of, and at, the valuation trial. False

All misrepresentations and false sworn testimony by the majority prevented: (i) discovery, (ii) liquidation, (iii) saving assets and liquidity and (iv) relief. They constituted discovery abuse and bad faith. They covered the key issues in the areas of squeezeout, waste, liquidation, reconstruction of non-existent and the misrepresented financial records, reconstruction and solving the puzzle of the stock records, uncovering secret offers and opportunities whose non-existence were misrepresented. The duty of complete fairness, candor, truthful responses under oath and keeping true, accurate and complete records rests with the majority. The fiduciary bears the burden of showing complete fairness and disclosure of all material facts. On any failure to account, every presumption is made against the fiduciary. Nothing was close about this case, but instead of relief, an equitable nightmare and torture test commenced.

V. Fourth Circuit Errors Of Law

The Fourth Circuit erroneously:

1. Affirmed the District Court, which in effect ruled that majority rule trumps everything--including fiduciary duty, the duty to keep records, the duty to speak and swear truthfully under oath, as follows: a) the District Court erroneously equates S.C. Code §§33-8-300 and 33-8-420 with the business judgment rule and states this "means a court will not substitute its judgment for that of the corporate managers where they act within their authority and without corrupt motives and in good faith" (App. 59a); whereas as the South Carolina statutes require the judgment of an "ordinarily prudent person" with "reasonable beliefs" and higher standards than majority rule; b) found no breach of duty in persistent false sworn testimony by corporate management/majority; c) would quote the law that "utter candor is mandatory," but find no wrongdoing in its finding of persistent wilful concealment of information by the majority from the minority; and d) could quote the requirements of "good faith" but made no attempt to apply it to pervasive concealments, adverse attitude against economic return, or false sworn testimony by management/majority on every subject matter. The Court ignored that majority rule is blocked by bookends of fiduciary duty, duty not to act in oppressive ways, duty to speak truthfully and duty of fair dealing. The Fourth Circuit failed to recognize that the business judgment rule does not apply to concealments, hostile attitudes, self-dealing or issues of loyalty or fairness. It failed to apply the correct standards to the facts, failed to find breaches of fiduciary duty, failed to award damages or assess equity by the correct standards and failed to reimburse the minority for the expense of proving the facts that constitute breaches.

The District Court's May 1, 1995 Order fails to recognize 33-8-300 and 33-8-420 as separate standards from the business judgment rule. (App. 59a). This error was pointed out repeatedly to the lower Court, including in the Supplemental Brief filed July 21, 1995, and the Supplemental Findings of Fact of August 14, 1995 and the Brief filed August 21, 1995. Neither the District Court nor opposing counsel ever once contended that the tests of 33-8-300 had been applied or met.

Despite finding unreasonable determination by the Poulnots with no sensible plan, in the face of "hopeless situation" of "astronomical" losses, to stay "the course even if it means the financial ruin of the company," the District Court ruled that the Poulnots did not breach their fiduciary duty of care to the Kreischers. (App. 50a). Under the rule erroneously utilized by the District Court, only the good faith business judgment is at issue. *See WLR Foods, Inc. v. Tyson Foods, Inc.*, 65 F.3d at 1184-85. To the contrary, South Carolina's standards of conduct require a comparison between the challenged director/officer and a hypothetical reasonable person. *Id.* at 1185. In *WLR Foods, Inc. v. Tyson Foods, Inc.*, the Fourth Circuit Court of Appeals compared the Model Business Corporation Act (identical in language to §§33-8-300 and 33-8-420) to Virginia's business judgment rule (a good faith rule similar to the one applied by the District Court). The Court of Appeals distinguished the former rule as follows:

> "by referring to an 'ordinarily prudent person' and the director's 'reasonabl[e] belie[f] concerning the corporation's [and, in the case of South Carolina, the shareholders'] best interests . . . [the South Carolina statutes] make[] clear that *one of the ways in which a litigant may prove that a director did not exercise good faith is by showing that a director's decision is irrational,*

> *i.e., that the decision does not comport with what a reasonable person would do under similar circumstances.*"

Id. (emphasis added). The Court of Appeals failed to apply this directly analogous holding to the instant case.

The Fourth Circuit erroneously ruled that the business judgment rule can trump the statutory standards, which in certain circumstances not existing here may be true with respect to duty of care, but is never true with respect to the duty of loyalty. Moreover, the Fourth Circuit's interpretation of what the District Court ruled with respect to the business judgment rule and 33-8-300 is in error and a breach of corporate law. The Court of Appeals assumed that the trial court found that 33-8-300 had been violated, but then applied the business judgment rule. (App. 10a, 11a). The record does not support this conclusion, and there is no suggestion to that effect. The District Court jumped right to the business judgment rule, shielded the conduct from scrutiny, and never considered an application of the facts to the standards set forth in 33-8-300. The District Court never applied the facts to determine whether the Appellees acted in good faith, with the care of an ordinarily prudent person in a like position would exercise under similar circumstances and in a manner he reasonably believes to be in the best interests of the corporation and its shareholders. S.C. Code Ann. §§33-8-300; 33-8-420. Had the District Court recognized that its findings of fact violated 33-8-300, its whole view of the case would have changed. Application of the law to the findings of fact would result in a finding of improper conduct. By clearly skipping these crucial steps and overlooking the applicable law, the District Court's application of the business judgment rule is fundamentally flawed and incomplete.

Consistent with the District Court's view that majority rule trumps everything, the District Court found that the Poulnots had not committed fraud because the Kreischers did not surrender their voting rights (App. 57a) and the Court implied that the Kreischers must prove the element of fraud as a precondition to recognition of a breach of fiduciary duty and implied that continuous attempted fraud was not legally cognizable (App. 54a-59a; also 2/1/93 Tr., P. 31, ll. 9-16; 6/7/93 Tr., P. 22, ll. 16-24). These views negated any independent assessment of "good faith" and converted wilful concealments to innocence. Based on the supremacy of majority rule, every corporate law was ignored or misapplied to create epic corporate and judicial abuse.

2. Failed to apply the duty of fair dealing as articulated by this Honorable Court to the events and practices that preceded and occurred during this litigation. The lower courts never applied or responded to the urged application of the duty of fair dealing. *Pepper v. Litton*, 308 U.S. 295, 306 (1939); *see also Talbot v. James*, 259 S.C. 73 S.C. 190 S.E.2d 759 (1972); *Southern Pacific Company v. Bogart*, 250 U.S. 483 (1919); *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983); *Gilbert v. McLeod Infirmary*, 64 S.E.2d 524 (S.C. 1951). In addition to the unfair events and practices already articulated, the minority never had any exit or offer of settlement or purchase presented prior to the Court's 1997 order. Poulnots' counsel advised the Court on July 24, 1993 that the Poulnots never offered to buy out the Kreischers. (7/24/93 Tr., p.22, L. 11-13; 6/7/93 Tr. P. 13, L. 1). The Poulnots admitted their failure to propose any offer of purchase in their Response 16 to Requests for Admission dated May 6, 1996. (P. Ex. 17, 9/10/96). In response to Request to Admit No. 17, dated May 6, 1996 (P. Ex. 17, 9/10/96), the Poulnots describe as offers of settlement two (2) taunts or invitations to capitulate, but neither was delivered nor received as a bona fide offer. One refers to the Kreischer's

dismissal of the lawsuit for nothing and the other refers to a speculative asset whose value was dependent upon the Poulnots' management or day to day future events. The Court of Appeals erroneously ruled that the majority had no obligation to present a fair exit or fairness in the circumstances. (App. 16a)

3. Failed to apply the law that makes the majority "trustees" for the minority in times of massive losses. *Tower Hill-Connellsville Coke Co. v. Piedmont Coal Co.*, 64 F.2d 817, 825-27 (4th Cir. 1933). It also erroneously permitted massive losses that occurred due to insensible and unreasonable management to be imposed upon the minority, notwithstanding the majority's refusal to adopt any reasonable plan to stop them and the minority's best efforts to stop them.

4. The lower courts erred in not finding oppression and squeeze out as a matter of law and in not finding that the losses were an integral part of such squeezeout in circumstances where corporate management/majority: 1) concealed assets and information from the minority; 2) had an adverse attitude against any economic return for the minority; 3) urged the minority to surrender voting rights for an annual sum the Court ruled unreasonable with no other way out; and 4) illogically persisted in causing massive losses while surreptitiously making plans for a major real estate development for themselves. The District Court's Order stated: "Oppressive conduct is only made out if the Plaintiffs can show the Defendants treated them unfairly." (App. 58a). However, the Court did not address the unfairness in pervasive concealments, adverse attitude against economic return, surreptitious development plans, no way out or the lack of any hope for economic return. The lower courts erred as a matter of law in not setting the date of squeezeout as the date of valuation and in failing to grant appropriate relief inclusive of interim equity. *Bonavita v.*

Corbo, 692 A.2d 119, 128 (N.J. Super. 1996); *Hendley v. Lee*, 676 F.Supp. 1317, 1324 (D.S.C. 1987); *Sugarman v. Sugarman*, 797 F.2d 3 (1st Cir. 1986); F. H. O'Neal, *Oppression of Minority Shareholders* §§7.13, 9.04 (1975).

5. The Court of Appeals erroneously affirmed an award in equity in an amount that is a fraction of the minority's fees and expenses of litigation as of the time of the award. The award reflected the deduction of fees and expenses of litigation of the majority paid by the corporation and all unsensible losses, resulting in a gross inequity of net zero for the prevailing party and unjust enrichment to the majority who inflicted the "wrong." *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991); *see also, Mills v. Electric Auto-Lite, Co.*, 396 U.S. 375, 395 (1970); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). Other errors are addressed hereafter.

The undisputed facts and the findings of fact by the lower court affirm violations of corporate law and basic integrity even though the lower court refused to so rule. In fact, the experience in the lower court was malevolent sport on three levels. On the corporate level, it was a renegade corporation operating with a persistent defiance of corporate laws. Any trustee or fiduciary can crush his beneficiary if permitted to use the corpus to do so. On the corporate counsel level, basic laws were denied, and false swearing, concealments and shifting stories by corporate management tolerated and defended by corporate counsel as though they had no common interest with the minority in redressing fraud and dishonesty in the corporation. The corporate corpus was used to defend zealously corporate wrongdoing and no efforts were taken to constrain or control renegade majority directors to the bounds of the law of corporate governance or to advise the whole Board of those constraints and the departures therefrom. Finally, the judicial level, Judge Houck failed and refused to enforce laws and

tolerated the Poulnots' defiance of corporate laws and corporate counsel's zealous defense of it.

This "extreme sport" reached new heights under the district judge who ignored misrepresentations and false litigating positions by the majority and the expense of the journey of the minority in exposing misrepresented corporate records and truths, and even fraud upon the Board and the Court. The District Judge would even convert admissions of fact into denials by stating "there is no concealment here" with respect to information that was admittedly withheld and whose non-existence was misrepresented on the record and in Board meetings. The Court also held that the representations by management/majority to the Board of Directors at a regular meeting as to absence of offers or interest in the corporate assets was "outside the bounds of the fiduciary relationship." (2/23/96 Tr., P. 83, ll. 16-24). The Fourth Circuit, which reportedly affirms trial judges in 97% of civil cases, summarily affirmed the Trial Judge notwithstanding the above acts and rulings.

VI. The Fourth Circuit Affirmed Outrageous Events That Occurred Pre-Ruling In The District Court

Before the District Court issued its findings on May 1, 1995 for the trial conducted in July and August 1993, four disturbing errors of law or gross abuses of discretion had occurred:

1. The Court stripped Counts at law for squeezeout and stock conversion, (which permitted direct action and thus a jury) plus an ancillary Count for breach of fiduciary duty, but promptly reinstated them in equity. The Judge ruled that he would right any wrong, including breach of fiduciary duty and the assessment of damages, for the same facts

described in the removed Counts. In this way, the Judge took personal control of the case on the eve of trial, notwithstanding the law.

2. After three days of trial, the court took away a seated jury. The Court had acknowledged that the stock conversion story would be offensive to a jury, although his subsequent rulings indicated that it was not offensive to him.

3. Massive illogical waste preceded this civil action. The continuing waste, coupled with the no way out stance of the majority, exacerbated the squeezeout. The Judge permitted the waste to continue unchecked until millions in CDs and receivables were wasted, doing nothing different one day to the next, while market forces closed remaining stores one by one. The inexplicable delay of nearly two years in the issuance of the first ruling, with full knowledge that this two family corporation was then averaging losses of $66,000 per month, was tactically oppressive (cumulative delays in rulings by the Judge equaled three years).

4. At the end of the main 1993 trial, the Court's refusal to curtail the majority's unlimited access to the corporate corpus for attorneys' fees and expenses, and its refusal to permit any reimbursement of the minority for their substantial expenses and fees. (This fact never changed--notwithstanding numerous pleas for relief or the Court's recognition of the minority as the "prevailing party" in 1995 (6/15/95 Tr., P. 11, ll. 5-8) or the minority disproving the majority's false sworn testimony on every subject matter).

VII. Post-Ruling Not Interested in Law or Facts or Interim Equity

Post ruling, events occurred that suggested strongly that District Judge was not interested in law or equity:

(a) at the request of the Judge, the minority submitted a comprehensive brief on attorneys' fees including citation of U.S. Supreme Court cases on "essential to equity"; "common fund," defiance of law and discovery abuse. No responsive brief on attorneys' fees was filed. After its ruling in 1995, the Court stated: "There's no question about it, equity would dictate that your clients [the minority] get their fees," (7/14/95 Tr., P. 38, ll. 16-18), but that no law permits them to be awarded. The minority shareholder never got any indication that the Court read their brief, yet received the contrary impression. The Court never mentioned federal law or evinced any understanding of the issues involved from this brief. However, as the Court stated on September 10, 1996:

> "I'm going to deny that motion [for attorneys' fees] again, just as I have denied it three or four times in the past because there is no legal authority for your position."

(9/10/96 Tr., P. 14, ll. 10- 12).

(b) South Carolina adopted the model act which requires officers and directors to act like "an ordinarily prudent person" and have "reasonable beliefs that their actions are in the best interests of shareholders" and "good faith." The District Judge shielded the Defendants' conduct with the business judgment rule and allowed the majority shareholders to do anything they wished. When the minority pointed out that South Carolina had enacted the higher standards of the model act and

the error of the court in not applying such standards, no responsive brief was filed and no one ever attempted to explain why that statute was not controlling. This was a major error of law which was pointed out in a succession of briefs without response from the Court or opposing corporate counsel. Minority shareholders pointed out that all of the concealments and false swearing covered up self-dealing by the majority, but the Court constantly exonerated the majority of every act.

(c) Minority shareholders requested money for the expense of an appraiser for Phase Two, inasmuch as they were the acknowledged "prevailing party" who had suffered a "wrong," (App. 61a) and they were the only party who been denied access to the corporate corpus for fees and expenses. The Court denied that request with full knowledge that the minority shareholders were paupers with no more funds for expenses and that they from all intents and capabilities could not continue in the litigation if required to advance more expenses.

VIII. Misrepresentation and Concealment of Real Estate Offers in 1995

At the Phase Two valuation trial, the Court refused to permit the minority to argue that the majority were estopped to argue substantially lower values than the historical value when their counsel had argued five months earlier that the real estate had risen substantially above the historical value, and the majority's counsel had made a similar argument by letter the summer before. Instead, the Court permitted the majority to argue that the value had suddenly dropped precipitously below historical values. These new precipitously low values, substantially below historical values, were the values urged by the majority and ultimately adopted by the Court in its inequitable award.

The minority relayed to the Court at the valuation trial their suspicion that surreptitious development plans had been underway by the majority, but that they had no proof of it. The Court had earlier instructed the majority shareholders that prospects just looking at the property were okay, so long as anything that even looked like it had any chance of materializing into a proposition was brought to the attention of the Board. The majority represented to the minority at the Board meeting just before the valuation trial that there were no offers for the real estate and that no one was interested in the corporate property. That representation was confirmed to the Court by the majority counsel at the valuation trial. Months later during another inexplicable delay in ruling, following specific inquiry as to any interest, the minority shareholders received four proposals, including pro forma for two hotels and retail, with no explanation as to the identity and capability of the parties or an "investor." The minority shareholders immediately forwarded the information to the Court and in a series of correspondence, copied to the Court, demanded more information and response to specific inquiries. The majority stonewalled those requests. Later the minority advised the Court of their suspicion that an active fraud was being conducted under the aegis of the Court. Eventually, the majority produced a thick packet of offers and opportunities for the real estate, most of which pre-dated the valuation trial and were for values and opportunities of much greater value than presented by majority shareholders at the valuation trial. These offers and opportunities contrasted fraudulently with the regular correspondence between parties which divulged only below market opportunities even though each represented a duty to speak. Concealed offers would arguably have increased the value of the minority's interest by seven or eight times that argued by the majority.

IX. Judge Ignores and Exonerates Fraud Upon Court

The minority filed a motion to open the record due to fraud upon the Court. Even though the majority's counsel said he did not know about the concealed offers and opportunities and assumed his appraiser did not as well (which proved true), and even though the Court knew of the efforts it took to extract information, the Court's reaction was anger and hostility toward the minority. This was the Judge that had witnessed this stonewall refusal to share information and the prior misrepresentations to the Court. That was the exact opposite reaction one would expect from a judge. The Court stated that the concealed evidence would not make any difference in its opinion of value and that there is no wrongdoing here, even though mathematically the dollars were much higher from every perspective and much higher than historical values. This reaction was startling. It cemented the impression that no fact or law or fraud could move this Judge to honor the laws that would punish the majority and grant relief to the minority. Inconsistently (and thus seemingly disingenuously), the Court punctuated the record with statements that it was there to do equity. Consistent with the pattern of exoneration of the local majority, the Court stated that its main focus was not to punish anyone. That attitude put into perspective the Court's desire to force a result that exonerated the Poulnots irrespective of fact or law (and wiped out the Kreischers). At this time, Court was aware that the minority shareholders had advanced in excess of $244,000 in expenses that were unpaid plus well in excess of a million dollars in fees and that the minority had no monies for future expenses. With that knowledge, the Court denied another request for expenses, but instead ordered the minority to incur the large expense of an MAI appraiser and to present an affidavit of an MAI appraiser within one week outlining the effect of the concealed information on value. While seemingly impossible, the minority did so.

X. Motion For Recusal Denied

In advance of the second valuation trial, the minority shareholders moved for recusal of the judge. It was denied.

XI. During Another Delay, Petition For Mandamus Stimulates Vindictive Ruling For Prevailing Party In Equity

Numerous statements in the record indicated that the District Judge would consider the concealed evidence on valuation. The concealed evidence increased all appraisals substantially.

The majority shareholders admitted in Responses to Requests For Admissions that they had not furnished any of the withheld information to the minority and also admitted to the regular correspondence between the parties, which in contrast with the concealments, screamed fraud. Ironically, the concealment of offers and opportunities with respect to the real estate matched the Court's prior findings that the majority regularly concealed information from the minority, including plans on how to capitalize on the value of the real estate. (App. 42a). Prior to the Phase I trial, the notes of corporate CPA had confirmed surreptitious plans to sell the downtown real estate "or partnership with an investor to possibly open a hotel," "this is already being done as much as possible," which impeached the Poulnots' public position that they would "never, never" sell the real estate (7/27/93 Tr., P. 252, ll. 9-22), as did their diary confessions: "David [Poulnot] feels we should consider selling the property, after I (EHP, III) told him sister would destroy us." (Pl. Ex. 151, 7/26/93).

The Court found no breach of fiduciary duty in its first Order, nor its second one, notwithstanding admissions of fact. Months later, during another inexplicable delay in ruling, the

shareholders filed a petition for mandamus to compel a final order. The Final Order that immediately followed was vindictive. Contrary to prior assurances, the Court did not consider the evidence of concealed offers and opportunities. The Court specifically ruled that there is no concealment here, though all parties admitted facts to the contrary. This effectively converted admissions into denials, despite responses to requests for admission and misrepresentations as to the non- existence of the withheld information to the Board and Court on the record. After consideration of fees and expenses of litigation, the Court's award results in zero to the prevailing party and unjust enrichment of the local Defendants. Later, on May 9, 1997, the Court would also rule erroneously that no one contested the ownership of ten shares at trial (four years earlier). That was an untrue statement that exonerated the fact that the majority swore falsely and concealed the ten shares and when discovered, wrongfully claimed beneficial ownership of the ten shares. However, the Court ruled that the ten shares remained in the Estate. The Court again ignored the fact that the majority gave false testimony in advance of the truth ultimately proven by the minority.

XII. Other Major Errors of Corporate Law by the Fourth Circuit

(a) Failed to address or redress fraud upon the Board of Directors and the Court in the concealment of offers and opportunities, misrepresentations as to the non-existence of such offers, or reimbursement for the expense caused thereby. Notwithstanding its advance promise to do so, Judge Houck failed to consider the concealed offers in determining the minority's equitable award. *Hazel-Atlas Glass Co., v. Hartford- Empire Company*, 322 U.S. 238 (1944).

(b) Erred in failing to acknowledge that pervasive concealments, while taking cash, urging surrender of rights for unreasonable sums and pressing every discount and disadvantage upon the minority and every benefit upon themselves, with an adverse attitude against any economic benefit for the minority is self-dealing. *In Re PTL*, 92 B.R. 1000, 1015 (D.S.C. 1988). *See also Baker v. Mut. Loan Inv. Co.*, 50 S.E.2d 692 (S.C. 1948); *Olin Mathieson Chemical Corp. v. Planters Corp.*, 114 S.E.2d 321, 326 (S.C. 1960); *Mortimer v. McKeithan Lumber Corp.*, 120 S.E. 723 (S.C. 1923); *Gilbert v. McLeod Infirmary*, 64 S.E.2d 524 (S.C. 1951).

(c) Failed to redress the majority's unlimited access to the corporate corpus for fees and expenses of litigation notwithstanding acknowledged concealments and hostile attitude, plus pervasive false testimony by the majority. *Segall v. Shore*, 269 S.C. 31, 236 S.E. 2d 316 (1967).

(d) Erred in not recusing Judge Houck for epic judicial abuse, mismanagement, bias and perceived oppression. *Lietky v. U.S.*, 1145 S.Ct. 1147 (1994).

(e) The Court erred in resolving or overlooking numerous badges of fraud in the corporate records concerning stock in favor of management/majority who were responsible for such records (concerning 200 shares of the 540 total outstanding shares which was an amount sufficient to make either side the controlling shareholder). *Halbersberg v. Berry*, 394 S.E.2d 7, 13 (S.C. App. 1990).

(f) The Fourth Court erred in not recognizing that the minority's brief gave details and admissions of facts that were opposed only by generalized denials of wrongdoing, the effect of which lawfully requires judgment for the minority.

Findings of specific acts and admissions of acts are not refuted by general denials of wrongdoing.

(g) Failed to apply the law that shifts the burden of proof to the majority shareholders when prima facie evidence of breach of loyalty, self-dealing, concealments and absence of stock records or financial records is shown. 123 C. Van Swearingen, *Fletcher Cyclopaedia the Law of Private Corporations*, §5811.10 (Perm. Ed. 1984); *Pepper v. Litton*, 308 U.S. 295, 306 (1939); *Talbot v. James*, 259 S.C. 73 S.C. 190 S.E.2d 759 (1972). It also failed to apply the standards applicable to a fiduciary with inadequate records. *Segall v. Shore*, *supra.; see also Anthony v. Padmar*, 465 S.E.2d 745, 753 (S.C. App. 1996); *Jacobson v. Yaschik*, 249 S.C. 577, 155 S.E.2d 601, 604 (S.C. 1967). It also failed to apply the law that every presumption is made against the fiduciary on a failure to account. *Lawson v. Rogers*, 435 S.E.2d 853, 857 (S.C. 1993).

XIII. Reasons For Certiorari: Errors Of Law Applied To Major Events

A. The lower courts erred in their view that the majority/business judgment rule trumps everything. They failed to recognize that the business judgment rule does not apply to self-dealing or issues of loyalty. The statutory tests of "an ordinary prudent person, in good faith, with reasonable beliefs" should have been applied to each of the major chapters in this case. Could an ordinarily prudent person reasonably believe that the following are in the best interests of the shareholders:

(1) Concealment of windfall insurance proceeds while urging the surrender of voting rights for an unreasonable sum;

(2) Wilful concealment of assets and information from the minority directors;

(3) An adverse attitude by management/majority shareholders against any economic return for the minority;

(4) Circumstances of insensible losses, with no reasonable plan for or prediction of improvement in the future, in circumstances where the majority seems committed to the financial ruin of the company;

(5) The failure to keep financial records in a businesslike manner and the concealment and nondisclosure of monies taken?

(6) To argue falsely that they knew what they were doing, to impose massive losses on the minority when the litigating position of the majority was proven false, to plan surreptitiously major real estate developments and to argue that the company and its assets have little value due to the losses and absence of opportunities.

(7) To refuse to offer any way out or partial or total liquidation or any hope of economic return for the minority in times of massive losses, while planning surreptitiously a major real estate development.

(8) Presenting false sworn testimony on every subject matter.

(9) To make offers of corporate money to induce the transfer of stock to the majority/management.

B. The lower courts failed to apply the duty of fair dealing as articulated by this Honorable Court, which requires

that complete inherent fairness be applied to each of the above actions. Separate issues exist as to whether any or all of the above circumstances pass as a matter of law the "good faith" requirement of the statutory standards or the business judgment rule or constitute "oppression" as a matter of law.

C. The lower courts failed to apply the laws that make the majority shareholders and directors trustees for the minority in times of massive losses. The law obligates the majority to operate at a profit and not to foist losses upon the minority. *Tower Hill, supra.* Would the actions of the majority comport with the standards of a trustee? Does this case, equity, and *Hendly v. Lee, supra.*, require that the date of valuation be the date of squeezeout?

D. Did the situation constitute "a squeeze out" as a matter of law in light of the hostile attitude against any economic return, massive losses and no way out and surreptitious plans for corporate assets?

E. Other Errors. The Poulnot diaries conclusively proved that the acts were committed and proved in bad faith and to advance the Poulnots' interest only and in defiance of corporate law. A breach of the fiduciary duty of loyalty aimed and directed at certain shareholders by concealment, adverse attitude and continuous attempted fraud is directly actionable and reflects tortious attempted squeeze out. Fair dealing requires the majority shareholder directors to show universal fairness when their loyalty is in issue. Persistent waste and surreptitious plans mandated a reasonable and fair exit, but the majority refused, preferring to oppress the minority. The Poulnots presented no evidence of fairness to the Kreischers. The resolve of the President to fight the minority every step of the way as reflected in his diary entries was bad faith, patently unfair and oppressive. The Poulnots had the duty to keep true,

accurate and complete records; because they failed to do so, every presumption is made against them. The District Court failed to recognize as a matter of law that it is fraudulent flim flam by management/majority shareholders to give false sworn testimony on major key facts on every subject matter in advance of proof to the contrary by the minority, and in failing to recognize the fraud and oppression under its own judicial supervision. Further, the actions of the majority in concealing offers and opportunities respecting the real estate and their affirmative misrepresentations as to the non-existence of such offers in Board meetings and in Court defrauded the minority and the Court but damaged the minority. Moreover, the Fourth Circuit failed to redress the constructive fraud imposed upon the minority by the District Judge stating that he would consider the effects of the concealed evidence, and then later excluding it in a vindictive ruling that was stimulated by Petition For Mandamus. The Court erred in failing to recognize and redress this fraud upon the Court and the minority.

CONCLUSION

The Fourth Circuit did not address numerous laws that would grant relief to the minority. It was hard to imagine that any Court could find that concealment of assets and information, unreasonable offers, attitude against economic return, or audit-proof corporate records were in the best interests of the shareholders. All findings of fact and admissions of facts pointed to self-dealing and greed by the majority. Opposing counsel rarely joined issue and general denials of wrongdoing are insufficient as a matter of law to rebut prima facie specific facts and admissions of wrongdoing.

The relief sought is a) an affirmation that the wrong laws and corporate standards were applied and b) remand to a new judge for plenary legal and equitable relief based upon the correct laws and standards, including interim equity, attorneys' fees and redress of pervasive concealments, adverse attitude, false swearing, fraud upon Board and Court and other wrongs, breaches and fraud.

Respectfully submitted,

JAMES S. OWENS, JR.
Counsel of Record
J. ROBERT HOWARD
JAY PONTRELLI
Nall, Miller, Owens,
Hocutt & Howard, LLP
Sixty-Six Luckie Street
Suite 200
Atlanta, Georgia 30303
(404) 522-2200
Attorney for Petitioners

(Any footnotes trail end of each document)

No. 97-1230, No. 97-1800

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JANE P. KREISCHER; CHARLES F. KREISCHER; EDWIN F. KREISCHER; BARBARA W. KREISCHER,
Plaintiffs-Appellants,

v.

THE KERRISON DRY GOODS COMPANY; EDWIN H. POULNOT, III; DALE WIDMAN; GENE POULNOT RIGGS; DAVID LAWRENCE POULNOT; JOAN HUTCHINSON POULNOT,
Defendants-Appellees.

JANE P. KREISCHER; CHARLES F. KREISCHER; EDWIN F. KREISCHER; BARBARA W. KREISCHER,
Plaintiffs-Appellees,

v.

THE KERRISON DRY GOODS COMPANY; EDWIN H. POULNOT, III; DALE WIDMAN; GENE POULNOT RIGGS; DAVID LAWRENCE POULNOT; JOAN HUTCHINSON POULNOT,
Defendants-Appellants.

September 25, 1998, Argued
January 26, 1999, Decided

NOTICE: RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL: ARGUED: J. Robert Howard, NALL, MILLER, OWENS, HOCUTT & HOWARD, Atlanta, Georgia, for Appellants.

Robert Buford Wallace, WALLACE & TINKLER, Charleston, South Carolina, for Appellees.

ON BRIEF: Jan Pontrelli, NALL, MILLER, OWENS, HOCUTT & HOWARD, Atlanta, Georgia; J. Rutledge Young, Jr., Stephen P. Groves, Sr., YOUNG, CLEMENT, RIVERS & TISDALE, Charleston, South Carolina, for Appellants.

Paul E. Tinkler, WALLACE & TINKLER, Charleston, South Carolina; T. Alexander Beard, BEARD LAW OFFICES, Charleston, South Carolina, for Appellees.

JUDGES: Before MURNAGHAN, WILKINS, and LUTTIG, Circuit Judges.

OPINION: OPINION

PER CURIAM:

The instant case is an appeal by the plaintiffs, Jane Poulnot Kreischer, Charles F. Kreischer, Edwin F. Kreischer, and Barbara W. Kreischer (collectively "the Kreischers"), who were minority stockholders of The Kerrison Dry Goods

Company, Inc. ("Kerrisons" or "the Company"). The stock of Kerrisons was largely owned by Edwin H. Poulnot, III, Dale Poulnot Widman, Gene Poulnot Riggs, David Lawrence Poulnot, and Joan Hutchinson Poulnot (collectively "the Poulnots"). The Kreischers contended that there were erroneous legal conclusions of the district court, including its holding that the defendants, the Poulnots, did not violate their fiduciary duties as majority stockholders in a close corporation and by ordering by the Poulnots of a relatively low amount at which to purchase the Kreischer stock. The Poulnots filed a cross appeal, claiming that the court erred in failing to apply minority and marketability discounts in evaluating the minority interest at the valuation phase of the trial. The Kreischers seek more than $ 3,000,000 as the value of the stock that they own and desire for the corporation to repurchase from them. Because the Kreischers appeared to suffer no individual injuries, we affirm the decision of the district court.

The factual background, as found by the district court at the liability phase of the trial, is as follows:

The Kreischers seek to have the corporate defendant, Kerrisons, judicially dissolved pursuant to S.C. CODE ANN. § 33-14-300 (Law. Co-op. 1990). The Kreischers contend that the Poulnots have engaged in a series of oppressive, illegal, and fraudulent acts all in an effort to squeeze the Kreischers out of their minority interest in Kerrisons. Alternatively, they claim that the Poulnots have wasted and misapplied the corporate assets of Kerrisons to such an extent that dissolution is warranted.

The Kreischers are minority shareholders who own approximately 28% of the stock in Kerrisons. The defendants

are Kerrisons, a department store and three small women's specialty shops including substantial real estate holdings, and the majority shareholders, "the Poulnots," who own approximately 72% of the stock in the Company. The Poulnots are members of the board of directors and also hold various positions as officers.

The Kreischers' complaint was filed on October 28, 1991. The six causes of action alleged by the Kreischers are as follows: breach of fiduciary duties by the directors of the Company (Count One); breach of fiduciary duties by the officers of the Company (Count Two); fraud (Count Three); conspiracy (Count Four); oppression (Count Five); and negligence, mismanagement, waste, and misapplication of corporate assets (Count Six).

The Kreischers brought the suit in their individual capacities and not as a derivative action on behalf of the corporation. They did so because they assert that "squeeze-out" suits are not derivative actions.

On that basis, the Poulnots moved for and were granted partial summary judgment as to counts one through four on the ground that the Kreischers suffered no individual damages as a result of the events of which they complained.[1] Counts five and six were permitted to proceed to trial, because individual shareholders may maintain such actions under S.C. CODE ANN. § 33-14-300.

The district court bifurcated the trial into liability and valuation phases. A jury was selected and began hearing evidence in the liability phase, but the court dismissed the jury on July 28, 1993. It did so because it concluded that judicial dissolution proceedings under § 33-14-300 are

equitable, not legal, and thus it must decide whether to grant the requested relief.

The district court found that the Kreischers' allegations fell into the following categories: (a) common law oppression; (b) stock fraud and manipulation; (c) the Poulnots' desire to control the entire company; (d) inadequate dividend return to the 28% minority shareholders; (e) using corporate funds personally to benefit the Poulnot majority shareholders and officers; (f) failure to disclose true financial information involving officers of the Company; (g) willful hostility toward the minority shareholders and outside directors; (h) conscious disregard for the rights of minority shareholders and outside directors; (i) failure to abide by the corporate bylaws; (j) failure to reveal to the minority shareholders the true financial state of the Company when attempting to purchase their minority interest; (k) large financial benefits to the Poulnots in terms of salaries, bonuses, and other compensation; (l) violations of the IRS Code; (m) dishonest and deceitful management; (n) falsifying documents; (o) misrepresentations to the court concerning the use of corporate assets and the state of corporate affairs; (p) continuing to allow operating losses; (q) allowing constructive loss in shareholder equity; (r) allowing loss in constructive rental income; (s) allowing estimated tax liability from the failure to reinvest Hurricane Hugo proceeds properly; (t) lack of any business plan for the future of the company; (u) the failure to exercise reasonable corporate business practices, including the failure to hire qualified managers to run and operate the company, from a sales, marketing, and financial standpoint; and (v) the failure to deal in fair terms with outside directors and minority shareholders.

The district court concluded that dissolution was not warranted, but that a court-ordered buyout of the shares was an equitable and appropriate solution to the matter. It therefore ordered such a buyout, and proceeded to the valuation phase of the trial in July 1995. During the first valuation trial, the court heard evidence from the Kreischers as to wrongful conduct by the Poulnots. The court later decided to reopen the record and hold a second valuation trial in September 1996 to address more of the Kreischers' allegations of wrongful conduct. Following the second valuation trial, the court finally concluded that the Kreischers' shares were worth $ 704,306.31. The Kreischers filed a timely appeal.

DISCUSSION

We review findings of fact by the district court under the clearly erroneous standard. See FED. R. CIV. P. 52(b); United States v. St. Paul Fire & Marine Ins. Co., 86 F.3d 332, 334 (4th Cir. 1996). A finding of fact is clearly erroneous if the reviewing court "on the entire evidence is left with a definite and firm conviction that a mistake has been committed," although there may be evidence in the record supporting the finding. United States v. United States Gypsum Co., 333 U.S. 364, 395, 92 L. Ed. 746, 68 S. Ct. 525 (1948). Conclusions of law are reviewed de novo. See St. Paul Fire, 86 F.3d at 334. Since the district court sat in diversity -- the Kreischers are residents of Georgia and Tennessee, while all of the Poulnots and other defendants are residents of South Carolina -- the rule of Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), requires the application of the law of South Carolina, the forum state.

I.

First, we must determine whether the district judge should have recused himself. The Kreischers contend that for a number of reasons, he should have recused himself from the bench in the instant case. Among their complaints against him are the following: (1) failure to address briefs on points of law that the Poulnots did not oppose; (2) the "perception that no fact or law could move the court"; (3) the court's conclusion that the Poulnots' conduct was "probably legal," despite the Kreischers' protests; (4) the court's application of the business judgment rule; (5) "harboring a closed mind"; (6) prejudice against their Atlanta counsel; and (7) oppression by delay in issuing its Order.

The standards for determining whether a judge must be disqualified from a matter are set out in 28 U.S.C. § 455 (Supp. 1998). Under the relevant provisions of that statute, a judge must disqualify himself or herself if: (1) his or her "impartiality might reasonably be questioned," id. at (a); or (2) he or she is biased against one of the parties or has personal knowledge of disputed facts. See id. at (b)(1). However, judicial rulings, by themselves, "almost never constitute valid bases for a bias or partiality motion." [*9] Liteky v. United States, 510 U.S. 540, 555, 127 L. Ed. 2d 474, 114 S. Ct. 1147 (1994). Moreover, "litigants may not make the trial judge into an issue simply because they dislike the court's approach or because they disagree with the ultimate outcome of their case." United States v. Gordon, 61 F.3d 263, 268 (4th Cir. 1995). The Kreischers appear to have alleged that to the extent that the court did not rule in their favor given the facts they presented, the court must be biased.

The Kreischers' argument is unpersuasive. The court ruled against the Kreischers on the issues of fraud, oppression and breach of duty because the Kreischers did not establish any injury to themselves. Since each of those causes of action requires that the plaintiff suffer an injury, the district court's decision was not based on prejudice but on sound legal principles. Moreover, the judge permitted the Kreischers a second opportunity after the initial valuation hearing to present evidence of the Poulnots' fraud. Thus, contrary to the Kreischers' assertions, the judge was open to adjudicating their claims. As a result, grounds 1-5 and seven are without merit.

Moreover, the judge did not appear to be biased against attorneys from Atlanta. While the judge did reference them, ("But when I see these reams of paper continue to come forward, then I assume the attorney meter is still running in Atlanta"), nothing in the record suggests that the judge harbored any ill feelings toward the attorneys for the Kreischers. When the judge would not allow one of the Atlanta attorneys to argue a portion of the case, he explained that he had "a lot of respect for [the other plaintiff's attorney] and I figured that, through [that attorney], we may be able to get the Plaintiffs' position properly articulated. With that, I'll be glad to hear from Mr. Howard if he has anything to say." The Atlanta attorney (Mr. Howard), then proceeded to make his argument. The judge's reasoning here appears to have less to do with where Mr. Howard is from than it does his opinion of the other lawyer. Thus, the plaintiffs have not demonstrated that the district judge should have recused himself.

II.

The Kreischers contest the district court's application of the law to the facts that it found. The court granted summary judgment to the Poulnots on Claims I-IV of the Complaint, which alleged that the Poulnots: (1) breached the duties of loyalty and care they owed to the corporation as officers, directors, and majority shareholders; (2) oppressed the Kreischers; and (3) defrauded the Kreischers. The district court found that the Kreischers suffered no actionable injury. In contesting the finding that there was no breach of fiduciary duties, the Kreischers contend that the district court misconstrued the standard for examining the breach of the duty of care owed to the corporation. These allegations will be addressed in turn.

South Carolina's statutory law imposes on directors, officers and majority shareholders the duties of loyalty and care, specifically requiring them to act "(1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he reasonably believes to be in the best interests of the corporation and its shareholders." S.C. CODE ANN. § 33-8-300 (Law. Co-op. 1990); S.C. CODE ANN. § 33-8-420(a) (Law. Co-op. 1990) (using the same language to describe officers' duties); Jacobson v. Yaschik, 249 S.C. 577, 155 S.E.2d 601, 604-05 (S.C. 1967) (holding that controlling shareholders are also fiduciaries who owe the duties of loyalty and care to the other shareholders).

A.

First we must address whether the business judgment rule controls.[2] Although the Kreischers challenge the district court's ruling, the court did not err in applying the business judgment rule. The Kreischers have argued that the business

judgment rule has been superseded by South Carolina statutory law, which employs a "reasonably prudent person" standard. South Carolina statutory law explicitly refers to the standard by which a director's behavior is to be judged as the reasonably prudent person under the circumstances. See S.C. CODE ANN. § 33-8-300 (Law. Co-op. 1990). The statute became effective after Dockside (the case that the district court cited) was decided.

The Kreischers have argued that the statute's plain language clearly mandates the use of the reasonably prudent person standard. They bolster their argument by pointing out that we have compared the Model Business Corporations Act, which uses language nearly identical to that in the South Carolina statute, with the business judgment rule and have concluded that the two rules are different. See WLR Foods, Inc. v. Tyson Foods, Inc., 65 F.3d 1172, 1185 (4th Cir. 1995). Thus, the Kreischers have argued, to the extent that the South Carolina statute requires an examination of what the "ordinary prudent person" would do, the business judgment rule cannot apply.

While the statute is silent as to its effect on the business judgment rule, a review of the legislative history of S.C. C ODE ANN. § 33-8-300 reveals that the legislature intended for the courts to decide that question. In the commentary accompanying § 33-8-300, the legislature expressly recognized that the statute could affect the application of the business judgment rule, and specifically left that matter to the courts to determine. See Comment to S.C. CODE ANN. § 33-8-300. Later in the history, the legislators stated that the business judgment rule is not necessary where the relevant parties have complied with the statute. Id. at n.4. The rule is used appropriately only where the parties have not complied

with § 33-8-300. Id. As a result, courts have continued to apply the business judgment rule. See, e.g., Goddard v. Fairways Dev. Gen. Partnership, 310 S.C. 408, 426 S.E.2d 828, 832 (S.C. App. 1993). Since § 33-8-300 does not categorically preclude the application of the business judgment rule, the district court did not err.

B.

Next we address whether the Poulnots breached their fiduciary duties.

1. Hurricane Hugo Insurance Proceeds

The Kreischers have asserted and the district court has concluded that such duties require the fiduciaries to disclose all material information to the shareholders. See Jacobson, 155 S.E.2d at 604-05. The district court found as a fact that the Hurricane Hugo insurance proceeds that the corporation received were material ("Hurricane Hugo was a momentous event in the financial life of s."). Thus, the Kreischers have argued, the willful failure to disclose all information relating to the insurance negotiations violated the duties of loyalty and fair dealing, particularly in light of the Poulnots' offer to exchange the Kreischers' stock.[3]

The district court properly concluded that the Poulnots did not breach the duty of loyalty. Although it found that the Poulnots did not advise the Kreischers of important information in a timely manner, the Kreischers cannot prevail because they were not injured or prejudiced by the Poulnots' failure to share the information.

As the Kreischers concede, they did not actually accept the stock swap offer from the Poulnots. Therefore, the Kreischers still owned the same amount of stock today as they owned before the purchase offer. That fact distinguishes the Kreischers' claims from the cases they cite because the plaintiffs in those cases actually sold their shares or were otherwise prejudiced. See Jacobson, 155 S.E.2d at 603 (stating that stockholder actually sold the shares); Talbot v. James, 259 S.C. 73, 190 S.E.2d 759, 761-63 (S.C. 1972) (noting that the shareholders signed certain agreements to permit the interested director to pursue a mortgage loan).

Moreover, Mr. Kreischer n4 admitted on cross-examination that at the May 10, 1990 board meeting, the board: (1) rejected a $ 1 million offer from the insurance company and (2) had an estimate of $ 3.5 million as a proper insurance award. n5 Kreischer was reasonably aware of where the corporation was in the process, because the board discussed the matter at this meeting.

Finally, the Poulnots made their original stock offer in May 1990, before Kerrisons knew what the actual award would be. Although negotiations with the insurance company were ongoing, the final insurance award of more than four million dollars was not made until February 1991. In the interim, a lower amount had been awarded by an arbitrator in November 1990 -- an award that the insurance company contested. By that time, the Kreischers had rejected the stock offer and made a counteroffer of their own. Since the Kreischers did not consummate the transaction with the Poulnots, and in any event, were aware of the potential settlement value, they cannot sustain their breach of loyalty claim.

2. Compensation

The Kreischers also complain that the Poulnots robbed the corporation to the extent that they withdrew funds from the corporation on a number of occasions. The Poulnots contend that the disbursements in question were not loans but compensation for services rendered and expenses reasonably incurred in the course of operating the business. The district court found that the drawing of consultants' fees and other stipends for some of the Poulnots was not a breach of their fiduciary duties. South Carolina corporate law forbids a corporation to "lend money to or guarantee the obligation of a director" unless the board -- other than the interested directors -- approves the loan or the board determines that the loan benefits the corporation and either approves the loan or a "general plan authorizing loans and guarantees." S.C. CODE ANN. § 33-8-320 (Law. Co-op. 1990). More generally, a conflict of interest transaction in which a director is involved is valid if: (1) the board knows the material facts or a committee of the board approved (or ratified) the transaction; or (2) the shareholders knew the material facts and they by vote approved (or ratified) the transaction; or (3) the transaction is fair to the corporation. See S.C. CODE ANN. § 33-8-310 (Law. Co-op. 1990).

The record provides substantial support for the district court's conclusions. First, some of the Poulnots, such as Jane H. Poulnot, never received any compensation from the company. Much of the other compensation was paid for business advice. Still other "compensation" took the form of commonplace company perquisites, such as the use of company cars, reimbursement for travel, food and lodging, and gasoline and credit cards. None of the compensation appeared to be loans to the Poulnots, and the district court did

not find them to be such. The district court did find that although the cars are sometimes used for personal reasons, the defendants pay some of the maintenance expenses of the cars. Moreover, any personal charges to the company gasoline or credit cards were either reimbursed or charged to the Poulnots' personal accounts.

Second, the IRS audited Kerrisons in 1987 and 1988 and found no wrongdoing with respect to the compensation arrangements. In addition, the company has been audited by several accounting firms -- including accountants whom the Kreischers helped select and with whom they have had conversations -- over the past two decades, and no wrongdoing has been uncovered.

Third, the district court found that the Kreischers themselves "also enjoyed certain benefits [at the corporation's expense] on a smaller scale."[6] Although the Poulnots clearly availed themselves of company resources to a greater extent, the Kreischers complaint that any such use of company property is fraudulent is disingenuous in light of their own usage.

Finally, the Kreischers were members of the board of directors who were under the same fiduciary duties as the Poulnots. They also are responsible for ensuring the financial health of the company and investigating matters that concern the corporation. Yet the record suggests that they had knowledge of the practices at issue here, if not the extent, [7] but undertook little or no action until they wanted to exit the company. Based on those facts, the district court did not err in finding that the Poulnots did not breach their fiduciary duties.

C. Fraud And Oppression

The Kreischers also have maintained that the above actions have resulted in fraud and that the stock offer was oppressive. Under South Carolina law, a plaintiff cannot successfully establish fraud without demonstrating that he or she suffered an injury. See First State Savings & Loan v. Phelps, 299 S.C. 441, 385 S.E.2d 821, 824 (S.C. 1989) (stating the elements of fraud). Since the Kreischers demonstrated no injury to themselves, there can be no fraud with respect to those issues.

The Kreischers also have contended that the court's findings that: (1) the Poulnots' attitude evinced a desire not to provide an economic return; and (2) the stock exchange plan was "unreasonably low" are evidence of oppression. Moreover, the Kreischers complain that the Poulnots never offered them any exit.

However, the record offers abundant evidence that establishes that there was no oppression. First, Mr. Kreischer admitted that the Poulnots always voted to include the Kreischers on the board, and have never made any effort to remove them from the board. In fact, meeting times were altered to accommodate the Kreischers, who do not live in South Carolina. Second, Mr. Kreischer testified that his relationship with Mr. Edwin Poulnot, Jr. -- who ran the company until his death in 1987 -- was "excellent." Third, the Kreischers' requests to review the minutes of meetings had never been refused prior to the instant litigation. Fourth, the Kreischers admit that they never objected to how board meetings were conducted. Finally, the Kreischers also admit that they "normally received" financial statements.

The offer, even if "unreasonably low," does not constitute oppression, either. First, the Kreischers: (1) did not initially feel "squeezed out," (2) felt that the Poulnots had a right to make the offer, and (3) thought that the offer was "interesting." Second, while the proposal would strip the Kreischers of their votes as shareholders, they would have been lifetime members of the board and would retain their voting powers as members of the board. Third, the proposal also guaranteed the Kreischers $ 20,000 a year. Finally the Kreischers only owned approximately 28% of the outstanding shares. They would always be outvoted anyway to the extent that the Poulnots disagreed with them.

Finally, the Kreischers point to no authority establishing that South Carolina law mandated that the Poulnots offer to buy their shares or otherwise help them out of the corporation. While S.C. CODE ANN. § 33-14-310 permits the court to order a buyout of a shareholder's shares, see id. at (d)(4), the statute says nothing about requiring controlling shareholders to offer a buyout on their own. Thus, on balance, there [*23] were sufficient facts for the district court to conclude that there was no oppression.

III.

In an attempt to avoid summary judgment on Counts I-IV, the Kreischers also argue that they may redress injuries to the corporation via their direct suit because Kerrisons is a close corporation. As stated above, the Kreischers did not prove individual damages for their claims of breach of fiduciary duties, fraud and oppression.

As a general matter, suits to recover assets or vindicate other rights of the corporation must be brought as derivative

actions, not direct actions. See Johnson v. Baldwin, 221 221 S.C. 141, 69 S.E.2d 585, 588 (S.C. 1952). Shareholders bringing direct suits must establish injuries to themselves as individuals. See Todd v. Zaldo, 304 S.C. 275, 403 S.E.2d 666, 668 (S.C. App. 1991) (stating that an individual shareholder may bring suit only when his "loss [is] personal and not a loss of the corporation").

Some courts have recognized that where there is a close corporation, a derivative action is not necessary. See Dresden v. Willock, 518 F.2d 281, 288 (3d Cir. 1975); Watson v. Button , 235 F.2d 235, 237 (9th Cir. 1935) (applying Oregon law); Thomas v. Dickson, 250 Ga. 772, 301 S.E.2d 49, 51 (Ga. 1983). The Kreischers argue that South Carolina has also adopted the rule.

However, when the issue was raised before the South Carolina Supreme Court, the court "recognized that there has been an evolution in the concept of minority rights," but did not formally adopt those principles. Davis v. Hamm, 300 S.C. 284, 387 S.E.2d 676, 680 (S.C. Ct. App. 1989). The court noted that cases advocating direct suits for shareholders in close corporations treated the parties like "joint venturers or partners." Id.; see, e.g., Dresden, 518 F.2d at 288. Moreover, the court noted that in Watson, the circuit court acknowledged that, among other things, the parties had agreed to be jointly responsible for the corporations' debts and the new owners of the corporation waived any right to bring a corporate cause of action against the malfeasant shareholder. See Davis, 387 S.E.2d at 679 (citing Watson, 235 F.2d at 237).

In a later case, the South Carolina Court of Appeals distinguished the Dickson case from the case before it after

assuming (but not deciding) for the purposes of that case that those principles applied. See Babb v. Rothrock, 303 S.C. 462, 401 S.E.2d 418, 419-20 (S.C. 1991). Therefore, South Carolina's courts have not expressly adopted the policy of allowing minority shareholders in close corporations to bring direct suits and we decline to do so here.

As a result, we conclude that there can be no liability unless the duties breached flowed to the plaintiff, "such as in the types of suits typified in Jacobson v. Yaschik [citation omitted] and in actions brought by minority stockholders pursuant to . . . Sections 33-14-300 to 33-14-330." See Davis, 387 S.E.2d at 680. As stated above, the Kreischers cannot avail themselves of the Jacobson rule because there was no transfer of shares or other transaction. Their claims under §§ 33-14-300 to 33-14-330 were permitted to go forward, and resulted in a court-ordered buyout pursuant to S.C. CODE ANN. § 33-14-310 (d)(4) (Law. Co-op. 1990). Thus, as to claims I-IV of the Complaint, summary judgment was appropriate.

IV.

Next we must find whether the court granted appropriate relief to the Kreischers.

A. Substantive Relief Granted

The district court found that no breach of fiduciary duties, fraud, oppression occurred. It therefore declined to order judicial dissolution pursuant to § 33-14-300. However, it did order the Poulnots to buy out the Kreischers' shares, pursuant to § 33-14-310(d)(4).

Section § 33-14-310, which provides the procedural requirements for judicial dissolution, also provides for buyouts and other relief where the conduct at issue does not warrant dissolution, but does require an equitable solution terminating the parties' relationship. See S.C. CODE ANN. § 33-14-310(d)(4). In light of the court's findings -- no fraud, oppression or breach of duty -- the relief is appropriate. See S.C. CODE ANN. § 33-14-300(2)(ii) (stating that the court may dissolve a corporation in a shareholder action "if it is established that" the directors have acted fraudulently, breached fiduciary duties or oppressed the other shareholders). A buyout achieves both the Kreischers' goal of exiting the company and the Poulnots' goal of continuing the business. See Hendley v. Lee, 676 F. Supp. 1317, 1327 (D.S.C. 1987) (ordering a buyout of a shareholder's shares where the court found that the defendant shareholder had not acted wrongfully). As a result, the relief granted will not be disturbed.

B. Attorneys' Fees

The Kreischers' motion for the awarding of attorneys' fees was properly denied. The district court determined that the request for attorneys fees was not ripe, because the judgment ordering a buyout had not been affirmed on appeal. Under DIST. CT. R. 54.02, the local rule in South Carolina's federal district courts governing attorneys' fees, a motion for fees is timely if filed within thirty (30) days of the entry of the final judgment of the district court or when that judgment is affirmed on appeal. However, the rule states that it applies "except as otherwise provided by statute or order of the court." In the instant case, the district court declined to consider the Kreischers' motion until judgment for them had been affirmed on appeal. As the rule permits the district court

to refuse to consider the Kreischers' motion when it was raised, its decision will not be disturbed.

V.

Next we must address whether the district court's valuation of Kerrisons was clearly erroneous. The Kreischers contend that the proper date for valuation is January 31, 1991, and that the court erred in not using this date. They also contend that they are entitled to $ 3,512,979.48 rather than the $ 704,306.31 value that the court placed on their shares. The Poulnots also appeal the valuation, claiming that the court erred in failing to apply minority discounts and failing to dispose of the ten shares owned by Edwin Poulnot II at his death. As the court had a substantial basis to conclude as it did, its findings as to the valuation date and value should remain undisturbed. However, it should have ordered the purchase of the remaining ten shares.

A. Valuation Date

The Kreischers have challenged the date of valuation selected by the district court, which was May 1, 1995 (the date of its Order). The Kreischers argue that January 31, 1991 was the appropriate date of valuation,[8] because that date: (1) was close to the period when the Kreischers first objected to the Poulnots' activities; (2) was close to when the Kreischers filed their complaint (October 28, 1991); (3) was midway between 1986 -- when the losses first began -- and 1995; (4) was in harmony with the 1988 and 1990 appraisals; and (5) was before the Poulnots spent much of the corporate funds on their legal fees.

While January 31, 1991 or October 31, 1991 would have been an appropriate date, the court's selection of May 1, 1995 was not clear error. The Kreischers do not cite any authority (nor have we found any) that would require that, in the absence of fraud or oppression, the date closest to the date on which the conduct was first complained of be set as the date of valuation. As it did not find fraud or oppression, the district court considered several dates, noting that the authority in those types of cases is scant.

Finally, it looked to Hendley, 676 F. Supp. at 1327, for guidance.[9] In Hendley, the parties sought judicial dissolution of a South Carolina corporation because the board was at an impasse and saw no hope for resolution.[10] After deciding that a forced buyout, not dissolution, was the appropriate relief, the court was faced with valuation issues. Id. at 1326-27. It reasoned that in dissenters' rights cases, the date of ouster is the appropriate date for valuation. Id. at 1327. However, since there was no ouster in that case, it selected the date of the hearing as the fairest date for all parties. Id.

The district court in the instant case followed that reasoning and reached the same result, a result we find acceptable here. The district court concluded that it would look to "what is fair between the parties." As stated above, the court found that there were no fraudulent or oppressive events that mandated that it select a particular date. Since any date would be inherently unfair to one of the parties, it reasoned, the most equitable date was May 1, 1995, the date of its Order.

The Kreischers' argument is unpersuasive. At bottom, their argument is premised upon findings of fraud and oppression and other wrongful conduct that would essentially entitle them to dissenters' rights. However, the Poulnots' conduct,

although distasteful, did not rise to that level. As stated above, we affirm the findings of the district court as to those issues. Moreover, equity requires fairness to the Poulnots, although it is their conduct of which the Kreischers complain. Finally, the date selected is consistent with the reasoning of other courts in this circuit addressing a similar issue. Therefore, the district court's selection of May 1, 1995 as the valuation date in the instant case was not clear error.

B. Valuation Amount

The Kreischers challenge the approximately $ 704,000 valuation of their interest, a figure the district court reached after two valuation trials. In determining the fair value of stock, the court should consider, where applicable, the market value and investment value of the stock and the net asset value of the corporation. See Morrow v. Martschink, 922 F. Supp. 1093, 1103 (D.S.C. 1995) (citations omitted). Specifically, the Kreischers claim that in computing the net asset value of the corporation, the court erred in failing to consider certain factors, such as $ 1.76 million in Hurricane Hugo insurance proceeds and offers to purchase or lease corporation-owned property.[11] They claim that the failure to include these items is clear error.

After the two valuation hearings, the district court concluded that the company's book value was $ 2,518,703, based on the appraisal of a CPA, Francis Humphries. Although the Kreischers also introduced expert testimony (Dr. Oliver Wood, an economist, appraised Kerrisons value at $ 2,715,477), the court found that appraisal less comprehensive because the appraiser had not adjusted the valuation amount for tax liability. Based on Mr. Humphries' appraisal, the

Kreischers, who own 27.9% of the shares of stock, were entitled to $ 704,306.31.

The district court's findings as to the value of the company were not clearly erroneous. The court reviewed the parties' submissions on the value of Kerrisons' real estate holdings, and then the company's overall book value. The parties' real estate appraisers disagreed on the value of the property on 260 King Street in Charleston.[12] The Kreischers' expert, Frank Batten, found that 260 King Street was worth $ 2,998,149. The Kreischers further contend that there are several offers that indicate certain prospective buyers' willingness to pay even higher amounts. By contrast, the Poulnots' appraiser, Stephen Attaway, valued 260 King Street at $ 1,850,000.[13]

However, the court did not err in accepting Mr. Attaway's appraisal over Mr. Batten's. Mr. Batten is not an appraiser, but a realtor.[14] Moreover, Mr. Batten never even inspected the inside of the property. By contrast, the Poulnots' appraiser, Stephen Attaway, is an MAI appraiser who inspected the entire building. Given that the appraisal the court accepted was performed by a professional who used appropriate methods of valuation while the rejected appraisal was not performed by a professional -- who in any event did not evaluate the entire building -- the court's acceptance of the $ 1,850,000 for the value of 260 King Street was not clear error. As the value of the 260 King Street property was the only real estate appraisal challenged by the Kreischers, the other values stand and the district court's acceptance of the overall real estate value as $ 3.8 million will not be disturbed.

Moreover, the court's acceptance of the Poulnots' expert's appraisal of the overall book value is also not clear error. The district court relied on the appraisal of the Poulnots' expert

regarding the overall book value, because he considered the tax liabilities. See Santee Oil Co., Inc. v. Cox, 265 S.C. 270, 217 S.E.2d 789, 792 (S.C. 1975) (listing taxation issues among the appropriate factors to consider during the valuation of a company). After accounting for the appropriate tax adjustments and losses the company suffered, Ms. Humphries concluded that the book value was slightly more than $ 2.5 million. As there is sufficient support in the law and the record for that evaluation, the finding will not be disturbed.

The Kreischers also contend that some of the Hurricane Hugo proceeds were not calculated into the appraisal. However, they are basing their appraisal on the value as of January 31, 1991, the date that they urge should be used for valuation purposes. As stated above, May 1, 1995 is the date of valuation, not January 31, 1991. As the Hurricane Hugo proceeds were paid in February, 1991 -- which is, of course, after the date selected by the Kreischers -- the Kreischers' argument fails because the additional money could not have been accounted for before the final award was known and in any event, there are no facts suggesting that the proceeds had not since been included for the purposes of the May 1, 1995 valuation date.

Finally, the Kreischers argue that the valuation did not properly reflect the true value of the company because various offers to purchase or lease Kerrisons' properties were not considered. That argument is not tenabie. One of the offers upon which the Kreischers rely in their argument was an offer by Mr. Michael Bisciotti, to either lease or purchase Kerrisons' property, including the 260 King Street property.[15] That offer was the second such offer by Bisciotti. The first offer, which was significantly lower, essentially was

considered fraudulent by the Kreischers. The Kreischers wanted the district court to consider his next offer, which was several million dollars higher, because the Poulnots indicated some willingness to accept it. However, as the Kreischers admit, the second offer by Bisciotti is "substantially higher than any appraisal," including their own. Moreover, Bisciotti's proposal was to lease the property over a twelve-year period. Therefore, inclusion of the full contract value of the lease to Kerrisons for the purposes of valuation would be inappropriate.[16] Several of the other offers that the Kreischers contend should be used are also lease arrangements and are above the value as appraised by both the Poulnots' and the Kreischers' experts. Like Bisciotti's offer, there were no appraisals. In light of those facts, the district court's decision to accept the appraisal of the only MAI appraiser was appropriate.

C. Minority Discounts

The Poulnots have claimed that the court erred in failing to apply minority discounts in valuing the Kreischers' shares. As the district court noted, there is support for granting minority discounts when there is a sale of the stock of close corporations. See, e.g., South Carolina Nat'l v. McLeod, 256 F. Supp. 913, 928 (D.S.C. 1966). Such discounts are considered appropriate because there generally is no ready market for the shares and it is unlikely that the minority shareholder will ever be able to obtain sufficient stock to control the company. See id. However, the district court reasoned that the instant case was more analogous to dissenters' rights cases, where such discounts are not awarded because such an award would reward the majority stockholders for their wrongful conduct. Id.

The Poulnots contend that they are entitled to the discounts because the district court found that they did not commit fraud, breach any fiduciary duties or oppress the Kreischers, and that the relief the Kreischers requested (dissolution) was not warranted. Moreover, they argue, Morrow v. Martschink, 922 F. Supp. 1093 (D.S.C. 1995), upon which the district court relied, is distinguishable because: (1) the parties in that case wanted the plaintiffs out while the Poulnots fought the buyout in the instant case; (2) the Morrow court had not made a finding one way or the other as to fraudulent or oppressive conduct, while the district court in the instant case made a finding that no such conduct occurred; and (3) there was no majority shareholder in Morrow, while there is one (Edwin Poulnot III) here.

While we recognize those differences between Morrow and the instant case, the Poulnots' argument fails nevertheless. First, there is authority supporting the proposition that discounts are not appropriate in forced buy-out cases. See Hendley, 676 F. Supp. at 1330 (stating that although discounts are appropriate where the parties are willing participants in the sale, they are not appropriate where the sale is not voluntary and "the transaction is between insiders") (citation omitted). Second, as the Morrow court stated in that case, families who run businesses often do not desire outside ownership interests in those businesses. See id. at 1105 (citation omitted). Therefore, the rationale behind discounts -- the lack of marketability -- is inapplicable when the transfer results in ownership by one family because it is that absence of marketability that makes the shares valuable to the family. Id.

Finally, the Poulnots' claim of complete innocence in light of the district court's findings is misleading. They correctly

assert that the district court concluded that no fraud, oppression or breach of duty occurred. However, the district court concluded that no fraud or oppression occurred because the Kreischers could not prove injury or prejudice, not necessarily because the Poulnots behaved properly. The court noted that the Poulnots failed to share material information relating to the insurance proceeds, found the Poulnots' actions suspicious, and the Kreischers suffered a "wrong." While the conduct did not warrant judicial dissolution, it did warrant the less drastic measure of a forced buy-out of the Kreischers' shares at fair market value. As a result, it was not clear error to fail to apply discounts.

D. The 10 shares owned by Edwin Poulnot, III

The Poulnots claim that the court failed to dispose of the ten shares owned by Edwin Poulnot at his death. The court found that the 10 shares remained in the estate, a fact that the Kreischers concede. Later, the district court recognized that it had not disposed of the shares, that the Kreischers were entitled to the benefit of them under Edwin Poulnot, III's will and contemplated ordering the corporation to purchase them along with the other shares. To the extent that the court did not dispose of the shares, it erred. Under S.C. CODE ANN. § 33-14-310, the court may in its discretion order the corporation to purchase the shares of a shareholder. See id. at (d)(4). In the instant case, the district court exercised that discretion to order the purchase of the Kreischers' shares by the corporation. However, its failure to order the purchase of all of the shares defeats entirely the purpose of the relief already granted to the Kreischers -- a complete exit from the company. Failure to order the sale of the remaining shares forces the parties to relitigate matters that have already been litigated at considerable expense of time and resources in the

district court. The district court acknowledged that it "made a mistake" by failing to include the stock, but took no action to complete the Kreischers' exit from the company. Thus, ordering the sale of the beneficial interest by the Kreischers to the company is appropriate. The district court should therefore order the company to purchase the remaining shares beneficially owned by the Kreischers.

CONCLUSION

In conclusion, we affirm the district court's orders of May 1, 1995 and January 29, 1997, as to the Poulnots' liability, the relief granted, and the value placed on the company. We remand the cause to the district court to order the purchase of the remaining ten shares beneficially owned by the Kreischers.

AFFIRMED IN PART AND REMANDED WITH INSTRUCTIONS

Footnotes

[1] The Poulnots' Motion for Partial Summary Judgment was granted on July 23, 1993.

[2] The business judgment rule as applied in South Carolina does not permit the board of directors' decisions to be overturned by judicial action absent proof of bad faith, dishonesty or incompetence. See Dockside Association, Inc. v. Detyens, 294 S.C. 86, 362 S.E.2d 874 (S.C. 1987).

[3] The Poulnots offered to exchange the Kreischers' common stock to nonvoting stock. The exchange would be tax-free,

the Kreischers would remain on the board, and would be paid $ 20,000 per year.

[4] References in the opinion to "Mr. Kreischer" are to Charles Kreischer.

[5] The district court found that during the insurance settlement negotiations, the Poulnots led the Kreischers to believe that the award would be between $ 2 million and $ 2.5 million. However, as is shown from Mr. Kreischer's testimony above, it is also clear that the Plaintiffs were aware that higher figures were possible.

[6] For example, Jane and Charles Kreischers' son was employed by Kerrisons while he attended school, and the company paid his automobile insurance and allowed him telephone calling card calls. The Kreischers themselves also availed themselves of the calling card.

[7] The district court specifically found that the accountants, in performing their audits, accounted for the practices in question.

[8] There appears to be a bit of confusion on this point. The Kreischers assert in their brief that January 31, 1991 is the appropriate date of valuation, but at various times in the proceedings below they assert both January 31 and October 31, 1991.

[9] We recognize that the corporation at issue in Hendley was still profitable at the time of litigation while Kerrisons was losing money. However, in light of the district court's findings as to the Poulnots' alleged misbehavior and the Poulnots' desire to continue the business, Hendley is

sufficiently analogous to provide support for the district court's decision.

[10] The district court in Hendley notes that the parties shifted positions several times, alternatively requesting dissolution or a forced buyout by the other party.

[11] The property in question is the property located at 260 King Street in Charleston, South Carolina.

[12] The Kreischers also had an MAI appraiser, Charles Middleton, value the property. He appraised the property at $ 3.3 million, which is higher than both the Kreischers' other expert and the Poulnots' MAI appraiser. However, the Kreischers' attorney stated that Mr. Middleton's testimony was offered to establish that one of the proposals offered to Kerrisons should not be accepted, not the valuation of the property. Therefore, the Poulnots did not cross-examine Mr. Middleton as to his valuation. As a result, the district court did not consider Middleton's appraisal. As the Kreischers indicated that Mr. Middleton's testimony was not being offered to prove value, we will not consider his appraisal, either.

[13] Mr. Attaway used three approaches in valuing the property, which were: the cost approach (resulting in a value of $ 1,750,000); the market approach (resulting in a value of $ 1,860,000); and the income approach (resulting in a value of $ 1,780,000). He relied mostly on the market approach.

[14] Batten testified that he had done appraisals before, but that he was not and never has been a licensed appraiser.

[15] Some of Bisciotti's proposals included lease arrangements, but he apparently was also interested in purchasing the property outright.

[16] Bisciotti did not actually compute, nor is there evidence that anyone computed, the discounted present value. He did opine that the discounted value of his offer would be at least $ 6.5 million, but that figure is speculative.

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Jane P. Kreischer, Charles F. Kreischer, Edwin F. Kreischer, and Barbara W. Kreischer,

Plaintiffs,

vs.

The Kerrison's Dry Goods Company, Edwin H. Poulnot III, Dale Poulnot Widman, Gene Poulnot Riggs, David Lawrence Poulnot, and Joan Hutchinson Poulnot,

Defendants.

Civil Action No: 2:91-3255-2

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Findings of Fact Conclusions of Law and Order

This action was brought by the plaintiffs who are seeking to have the corporate defendant, Kerrison' s Dry Goods Company ("Kerrison's" or "the Company"), judicially dissolved by this court pursuant to S.C. Code Ann. § 32-14—300 (Law. Co—op. 1990). The basis of the plaintiffs' complaint is that the defendants have engaged in a course of oppression, illegality, and fraud in an attempt to squeeze the plaintiffs out of their minority interest in Kerrison's. In addition, the plaintiffs' claims allege the defendants have wasted and misapplied the corporate assets of Kerrison's which also entitles them to corporate dissolution.

The plaintiffs, Jane Poulnot Kreischer, Charles P. Kreischer, Edwin F. Kreischer, and Barbara W. Kreischer (collectively "the Kreischers") are minority shareholders, owning approximately 28% of the stock in The Kerrison Dry Goods Company, Inc. The defendants are The Kerrison Dry Goods Company, Inc., a department store and three small women's specialty shops including substantial real estate holdings, and the majority shareholders Edwin H. Poulnot, III, Dale Poulnot Widman, Gene Poulnot Riggs, David Lawrence Poulnot, and Joan Hutchinson Poulnot (collectively "the Poulnots"), who own approximately 72% of the stock in the Company.

The plaintiffs filed the complaint in this action on October 28, 1991, alleging six causes of action. Count one claims breach of fiduciary duties by the directors of the Company; count two alleges breach of fiduciary duties by the officers of the Company; count three asserts fraud against the defendants; count tour alleges conspiracy; count five alleges oppression; and count six alleges negligence, mismanagement, waste, and misapplication of corporate assets.

This matter first came before this court for a bearing on plaintiffs' Motion for a Preliminary injunction on December 18, 1991, to enjoin disposition of the remaining Hurricane Hugo insurance proceeds in the approximate amount of 1.1 Million ($1,100,000.00) Dollars held in the form of a certificate of deposit. This court granted that motion orally, ordering that the funds remain in the certificate of deposit and enjoining the further use of the insurance proceeds except for legitimate corporate purposes and with the approval of this court. On March 4, 1992, at the request of the defendants, the court authorized the release of One

Hundred Fifty—eight Thousand and 00/100 ($158,000.00) Dollars from the fund. Thereafter, on April 29, 1992, the preliminary injunction was dissolved, and a mortgage in favor of plaintiffs' attorney in the amount of nine Hundred Thousand and 00/100 ($900,000.00) Dollars was granted on corporate property located at 254 and 256 King Street, Charleston, South Carolina.

The plaintiffs assert their claims in this case in their own right and further claim that this suit is not brought as a derivative action for the benefit of Kerrison's shareholders. The Kreischers contend that the gravamen of their complaint is a minority shareholder "squeeze-out" and that a lawsuit asserting a squeeze-out is not a derivative action. The plaintiffs' characterization of the action, however, is not controlling. The feature distinguishing shareholder derivative actions from actions maintainable on behalf of individual shareholders is whether the damage is to the individual shareholder or to the corporation as a whole. The latter class of cases may. only be maintained as derivative actions.

The defendants moved for partial summary judgment as to counts one through four on the ground that the plaintiffs suffered no individual damages as a result of the allegations contained therein. The court carefully reviewed the matter and could find no individual damages suffered by the plaintiffs. Thus, Counts one through four of the complaint were found not to be derivative causes of action, and defendants' Motion for Partial Summary Judgment was granted as to the same on July 23,1993. Count five for oppression and count six for negligence, mismanagement, waste and misapplication of corporate assets can be maintained by individual stockholders pursuant to S.C. Code Ann. § 32—14—300 and, therefore, they remained viable.

The case was bifurcated to first determine if the plaintiffs were entitled to any relief; A jury was drawn, and the case proceeded to trial. That portion of the trial began on July 26, 1993, and ended August 12, 1993. On July 28, 1993, this court dismissed the jury, holding that a proceeding for judicial dissolution under § 33—14—300 was equitable in nature, and the court alone had the final authority to decide whether the plaintiffs were entitled to the relief sought in counts five and six.

At trial the plaintiffs relied on a great deal of conduct which they allege constitutes illegality, fraud, oppression, and unfairly prejudicial conduct, as well as waste, negligence, mismanagement and misapplication of corporate assets. That conduct can be summarized as follows: common law oppression; stock fraud and manipulation; the defendants' desire to control the entire company; inadequate dividend return to the 28% minority shareholders; using corporate funds to personally benefit the Poulnot majority shareholders and officers; failure to disclose true financial information involving officers of the Company; willful hostility toward the minority shareholders and outside directors; conscious disregard for the rights of minority shareholders and outside directors; failure to abide by the corporate bylaws; failure to reveal to the minority shareholders the true financial state of the Company when attempting to purchase their minority interest; the defendants awarding themselves large financial benefits in terms of salaries, bonuses, and other compensation; violations of the IRS Code; dishonest and deceitful management; falsifying documents; misrepresentations to the court during this litigation concerning the use of corporate assets and the state of corporate affairs; continuing to allow operating losses; allowing constructive loss in shareholder equity; allowing

loss in constructive rental income; allowing estimated tax liability f rom the failure to reinvest Hurricane Hugo proceeds properly; lack of any business plan for the future of the company; the failure to exercise reasonable corporate business practices, including the failure to hire qualified managers to run and operate the company, from a sales, marketing, and financial standpoint; and the failure to deal in fair terms with outside directors and minority shareholders.

This court has given careful consideration to the evidence of record, the arguments made by counsel for the parties, and the applicable law, and herein publishes its Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

1. The plaintiffs Jane Poulnot Kreischer, Charles F. Kreischer and Edwin F. Kreischer are residents and citizens of the State of Georgia. plaintiff Barbara W. Kreischer is a resident and citizen of the State of Tennessee. All of the individual defendants are residents and citizens of the State of South Carolina. Kerrison's is a South Carolina corporation with its principal place of business in Charleston, South Carolina.

2. The Kerrison's Dry Goods Co. Inc. was started in the 1830's. In the 1920's, the Company was incorporated and purchased by a group of investors, including Huger Poulnot, the grandfather of Edwin H. Poulnot, III. The Company was run by Huger poulnot and then by his sons, Edwin H.

Poulnot, Jr. (who died on February 13, 1987), Louis poulnot, and Charles F. Poulnot, Sr. (who died on November 26, 1971). By 1975 Edwin H. Poulnot, Jr. and his family owned all the stock.

3. At one time the Kerrison's Dry Goods Co., Inc. operated its flagship downtown store at 260 King Street and had other South Carolina stores in Orangeburg, Myrtle Beach and in Charleston at St.. Andrews Shopping Center and Northwoods Mall. The Orangeburg and Myrtle Beach stores closed. Hurricane Hugo destroyed the downtown store which was never reopened, and the Northwoods Mall store closed on December 31, 1992. The St. Andrews store is still open.

4. Because of the, fierce competition from large national department stores and other economic factors, the defendants, with the unanimous consent of the Kerrison's Board of Directors and all shareholders, switched the focus of the company in 1990 to small, leased ladies specialty stores known as Concepts. These stores are located at 254 King Street in downtown Charleston, South Windermere in West Ashley, Mount Pleasant, and Summerville.

5. The real estate owned by the company through a wholly owned subsidiary known as Department Stores, Inc., consists of 260 King Street (approximately 51,000 square feet), a parking lot on Wentworth Street, and 254 and 256 King Street. The appraised value of this real estate is according to a February 24, 1988, appraisal:

260 King Street	$3,200,000
Parking Lot	$1,150,000
254 King Street	$ 400,000
256 King Street	$ 360,000

TOTAL: $5,110,000

In addition, Attaway, Thompson, Jeffers & Associates, the appraisers who did the 1988 appraisal, did a post—Hurricane Hugo review of the property on April 18, 1990, and determined the value of the property was not less than the value previously reported in the 1988 appraisal. Furthermore, the defendants put approximately 2 Million ($2,000,000) Dollars of insurance proceeds into the real estate after Hurricane Hugo. There is one first mortgage on 260 King Street with a current balance of approximately Nine Hundred Thousand ($900,000) Dollars, which has a balloon payment of tight Hundred Ninety-nine Thousand Twenty-two ($899,022) Dollars due May 1, 1995. Otherwise the real estate is not encumbered.

6. In its heyday, in the early 1980's, Kerrison's annual gross sales were slightly over Nine Million ($9,000,000) Dollars. For Financial year End ("FYE") January 31, 1993, Kerrison's consolidated gross sales were Four Million Nine Hundred Twenty—one Thousand Three Hundred Seventy-seven ($4,921,377) Dollars, with a gross profit of One Million Eight Hundred Eight Thousand One Hundred Twenty—three ($1,808,123) Dollars. After expenses, operations for FYE January 31, 1993, sustained a loss of Four Hundred Two Thousand One Hundred Forty-nine ($402,149) Dollars. Kerrison's last profitable FYE was January 31, 1986, when the company had a net income from operations of Sixty—six Thousand Two Hundred Thirty—six ($66,236) Dollars. Since then, the net operating losses, before inclusion of the Hurricane Hugo proceeds, have been as follows:

FYE 1/31/87 $ 269,000

FYE 1/31/88	$ 330,751
FYE 1/31/89	$ 603,943
FYE 1/31/90	$ 754,525
FYE 1/31/91	$ 786,525
FYE 1/31/92	$ 420,752
FYE 1/31/93	$ 402,149
1st 6 mos of FYE 1/31/94	$ 560,000
Total	$4 .127, 645

7.There are 540 shares of stock issued and outstanding in the Kerrison's Dry Goods Company, Inc. The shares of stock in Kerrison's are now owned as follows:

Jane P. Kreischer	136
Edwin H. Poulnot, III	276
Charles F. Kreischer	5
Dale Poulnot Widman	26
Edwin F. Kreischer	5
Gene Poulnot Riggs	26
Barbara W. Kreischer	5
David Lawrence Poulnot	26
Joan Hutchinson Poulnot	25
Total	151
Total	379

Edwin H. Poulnot, Jr. died on February 13, 1987, owning 10 shares of stock .in Kerrison's Dry Goods Company, Inc.

8.The Company has had regular shareholders' and directors' meetings over the years. The meetings generally were scheduled around Jane and Charles Kreischer's ability

to be in Charleston. Edwin H. Poulnot, III, is on the hoard of Kerrison's. The plaintiff, Charles Kreischer, was elected to the board in 1979, and his wife, Jane poulnot Kreischer, was elected in 1986. The defendant, Dale Poulnot Widman, is on the board as well, and the defendant Gene Poulnot Riggs was elected to the board after the death of her grandfather in 1987.

Edwin H. Poulnot, III, is now President of Kerrison's, his daughter Dale Poulnot Widman is Executive Vice President of Kerrison's, and his daughter Gene poulnot Riggs is Vice President of Kerrison's. Other employees serve as secretary and treasurer of the Company. The Kreischers have never been full time employees of the Company. Any benefits the plaintiffs have received from Kerrison's is strictly limited to those as shareholders, and members of the Board of Directors in the case of Jane and Charles Kreischer, While Charles Kreischer has from time to time given Edwin Poulnot, III, free advice about how to handle various business problems, Jane and Charles were passive members of Kerrison's Board of Directors until 1990.

9. At a consolidated directors' and shareholders' meeting that took place on November 4, 1988, the board of directors first discussed liquidation of the Company because of its Continued financial deterioration.. The board determined that if a solution to the losses being sustained by the Company could not be found, "then a. date beyond which we would not go should be set". This plan was of considerable interest to the Kreischers who were anxious to see some return for their minority shareholder interest in the Company and because the Kreischers were no longer optimistic about the Company's ability to make a profit. There was not another shareholders' or directors' meeting until May of 1990, after Hurricane Hugo struck on September

22, 1989.

Around the May 1990 consolidated meeting the Kreischers again approached Edwin Poulnot, III about the liquidation of Kerrison's. It was at this May 1990 meeting with Jane and Charles Kreischer that Edwin Poulnot, III made his offer to purchase the Kreischer's minority shares in Kerrison's. This oral of fer was refused, but again on September 14, 1990, Edwin Poulnot, III made basically the same offer to Jane and Charles Kreischer in writing. The contents of the September 14, 1990, offer provided that the Kreischers exchange on a tax—free basis their common stock for nonvoting preferred stock but remain on the board and receive Twenty Thousand ($20,000.00) Dollars a year as a director's fee. It further stipulated that their preferred stock would share in any dividends on a pro rata basis, they would continue to receive employee discounts on all merchandise purchased and share in any liquidation distribution on a preferred basis limited to the value of the property as of October 1, 1990.

Edwin Poulnot, III was apparently seeking to accomplish four goals in his offer to the Kreischers. First, he wanted to give the Kreischers money from the store; second, he wanted his two daughters to avoid any interference from other family members in running the store by having the Poulnots own all of the stock; third, Edwin Poulnot, III was attempting to give his daughters incentive to make the store profitable by giving them independence; and, fourth, he sought to complete an estate plan for himself.

On October 2, 1990, Jane and Charles Kreischer once again declined Edwin Poulnot, III's offer, but they counter offered, in writing, to sell their shares in Kerrison's for Seven

Thousand Three Hundred Forty-seven and 31/100 ($7347.31) Dollars per share with a small increase if the real estate were told for more than a minimum price. The offer indicated that it was good for thirty days. Edwin Poulnot, III declined the Kreischers' counteroffer on November 5, 1990. This litigation followed approximately eleven months later.

10. Hurricane Hugo was a momentous event in the financial life of Kerrison's. When Edwin Poulnot, III finally settled the dispute with the insurance company on February 1, 1991, the insurance proceeds from Hurricane Hugo amounted to at total of Four Million Five Hundred Twenty—nine Thousand Four Hundred Eighty—eight and 42/100 ($4,529,488.42) Dollars. The Kreischers had been led to believe that the recovery would be in the $2 Million ($2,000,000) to $2.5 Million ($2,500,000) Dollar range, however, the Kreischers did not learn of the true amount of the insurance recovery until the consolidated directors' and shareholders' meeting on August 28, 1991, six and a half months after the last check was received from the insurance company.

There were several opportunities for Edwin poulnot, III to advise the Kreischers of the receipt of the insurance proceeds, including the board of directors' meeting which was held on May 6, 1991. The revised agenda and the official minutes of that meeting, however, are silent concerning the insurance funds. Likewise, the Kreischers were not always fully informed about the goals arid plans of the business in general, other litigation the Company was involved in, various plans of the defendants to capitalize on the real estate, and the Poulnots' plans to most effectively use the insurance proceeds from Hurricane Hugo. Some of this lack of information resulted from the Kreischers' passive

membership on the board of directors, and the Company's historical failure to adhere to formal corporate rules of procedure. A great deal of it, however, was a result of the Poulnots' conscious failure to keep the plaintiffs advised of the important affairs of the company. The Kreischers relied on the poulnots to run the day to day business affairs of the Company. As a result, the Poulnots enjoyed a large amount of freedom to make decisions as they saw fit often without approval from the board of directors. All parties acquiesced in this course of conduct for many years.

11. From 1975 until 1992, Edwin H. Poulnot, III was paid a modest salary from Kerrison's which averaged during that time period Thirty-eight Thousand Four Hundred Twenty-four and 61/100 ($38,424.61) Dollars. The highest salary paid during one year was) in 1987 when he was paid Sixty—eight Thousand Five Hundred Fourteen ($68,514.00) Dollars. From 1979 through 1982 Edwin Poulnot, III was paid a small second salary, averaging Seventeen Thousand Three Hundred Seven and 75/100 ($17,307.75). Dollars per year when he took over the additional duties of an employee who retired. That second salary was incorporated into his regular Kerrison's salary beginning in 1983. In addition, Edwin Poulnot, III was paid annual bonuses from 1975 until 1981 which averaged Thirty—six Thousand Fifty—seven and 14/100 ($36,057.14) Dollars. From 1978 until 1986, Edwin was paid "other" compensation by Kerrison's totaling Thirty Thousand Two Hundred Eighteen ($30,218.00) Dollars, which included certain items such as the payment of life insurance premiums.

Edwin Poulnot, III was also paid a salary by Department Store, Inc., a wholly owned subsidiary of Kerrison's, of Eleven Thousand Six Hundred Seventy—f ive

($11,675.00) Dollars in 1984; Three Thousand Eight Hundred Seventy—seven ($3,877.00) Dollars in 1986; and Nine Hundred Sixty-nine ($969.99) Dollars in 1987. He was also paid "other" compensation from Department Stores, Inc. for the years 1984 through 1992 totaling Sixty-two Thousand Two Hundred Ninety—two ($62,292.00) Dollars, again including such things as life insurance premiums.

From 1984 until 1992 Dale Poulnot Widman was paid a salary which averaged during that time Forty-Thousand Three Hundred Sixty— nine and 56/100 ($40,369.56) Dollars. Except for a small monthly stipend which she received while training at another department store prior to coming to work for Kerrison's, Dale Poulnot Widman has never been paid any bonuses or other compensation from Kerrison's, nor has she received any form of compensation from Department Stores, Inc.

Gene poulnot Riggs also received a small stipend prior to coming to Kerrison's while she was training at another department store, but during the years 1987 through 1992 she has been paid on average a yearly salary of Twenty—seven Thousand Eight Hundred Three and 83/100 ($27,803.83) Dollars. Gene poulnot Riggs has never received any bonuses or other compensation from Kerrison's, nor has she received any form of compensation from Department Stores, Inc.

Prior to 1989 David poulnot was periodically paid small consulting fees by Kerrison's for business advice he gave the Company. For those years he was paid an average of Three Thousand ($3,000.00) Dollars per year. Joan Hutchinson Poulnot has never received any compensation from Kerrison's.

12.Throughout the years, all of the parties to this litigation, particularly the defendants who run the Company, have enjoyed the perquisites of what was once a very lucrative business. Edwin Pulnot, III, Dale Pulnot Widman, and Gene Pulnot Riggs all drive very modest company cars which they, as well as other Kerrison's employees, use for business purposes. In addition they drive these company cars for their personal use and personally pay for some maintenance to the automobiles. The employees of Kerrison's also enjoy the benefits of travel on buying trips for the Company. These employees, including some of the defendants, are reimbursed for food, travel and lodging on a very conservative basis.

Kerrison's employees, including the defendants, have also enjoyed the benefits of certain gasoline and credit cards. Any time these credit cards were used for personal items, however, the Company was either reimbursed or the charges were credited to the individuals' personal accounts. Life insurance premiums have been paid for Edwin Poulnot, III over the years by Kerrison's, as well as the fees for certain personal legal advice. Kerrison's has also paid for the preparation of personal tax returns for Edwin Poulnot, III, Dale Poulnot Widman, and Gene Poulnot Riggs on different occasions.

The plaintiffs have also enjoyed certain benefits on a smaller scale, including the use of telephone calling cards for some years. Jane and Charles Kreischer's deceased son Chip, the husband of the plaintiff, Barbara W. Kreischer, also worked periodically for Kerrison · s while he was a student and received similar benefits during his employment, including gasoline and automobile insurance payments.

Kerrison's was audited by the Internal Revenue Service for the years 1987 and 1988, and there were no adjustments made for personal use of corporate funds for nonbusiness purposes. The IRS did not question any of the practices that the plaintiffs complain of in this litigation. In addition Kerrison's has been audited by a large number of different private certified public accountants over the years, all of whom have had knowledge of the practices of Kerrison's and had to rely on such practices in doing their audits.

In short, the parties to this litigation have treated Kerrison's corporate structure very informally. The defendants have particularly enjoyed the benefits of Kerrison's. While many of the business practices of Kerrison's are not in keeping with those of a large modern retail business, the plaintiffs have acquiesced in the defendants' conduct while enjoying some benefits of Kerrison's on a smaller scale.

13.Kerrison's has only paid dividends to its shareholders in years when it has made a profit, and since 1986 no dividends have been paid to anyone. The plaintiffs received dividends from Kerrison's in the amount of Eight Thousand Six Hundred Sixty ($8,660.00) Dollars total, at Ten ($10.00) Dollars per share each year a dividend was paid. Dividends were paid from 1976 through 1986, when the corporation ceased paying dividends completely due to its poor financial condition. No employee has been paid a bonus in the years since the Company stopped paying dividends. Edwin Poulnot, III has, however, received a small additional compensation from Department Store, Inc. since 1986 for his management of the Company's real estate.

14. There are 540 shares of stock issued and outstanding in Kerrison's Dry Goods Company, Inc. In 1979, Edwin H. Poulnot, Jr. owned 200 shares of stock in Kerrison's. According to the stockbook, thc shares were transferred in an orderly fashion.

The stockbook indicates that Edwin H. Poulnot, Jr. owned 200 shares and Edwin H. Poulnot, III owned 164 shares prior to 1979. Jane Poulnot Kreischer owned 136 shares at that time. The stockbook also indicates 5 sets of 3 shares were issued to Edwin H. Poulnot, III and his family on December 26, 1979. The stockbook further indicates that another 5 sets of 3 shares were issued to Edwin H. Poulnot, III and his family on February 4, 1980.

Contrary to the stockbook, however, successive accountant workpapers indicated a different list of stock ownership for those years indicating that four and one half shares had been issued in 1979 and one and one half in 1980. Contrary to the stockbook and, in some instances, the accountant workpapers the corporate tax returns are inconsistent with both the stockbook and the accountant workpapers in depicting the ownership of stock by the officers. In addition, a note of Ray Smith, the controller of Kerrison's at the time, dated August 15, 1980, reflects an instruction to back—date to 1979 and 1980, transfers of 30 shares of stock per Edwin H. Poulnot, III, although theta are no indications of back—dating in the stockbook itself.

There are other inconsistencies with the 1979 and 1980 transfers, including the accountant workpapers of January 31, 1983, and February 24, 1983. A September 16, 1993, letter from Edwin H. Poulnot, Jr. to Edwin H. Poulnot, III attempts to transfer 200 shares in trust to Edwin H.

Poulnot, III. The September 20, 1983, common stock summary prepared by company accountant, Noel Thorn, states that Edwin. H. Poulnot, III owned 164 shares and Edwin H. poulnot, Jr. still owned 200 shares. The September 30, 1983, statement of assets prepared by Noel Thorn reflects that Edwin H. Poulnot, Jr. still owned 200 shares. The October 24, 1983, letter of Jack White reflects that Noel Thorn and Jack White are confirming to Edwin H. Poulnot, Jr. that he continued to own 200 shares of stock. The memo of Heyward Carter dated November 7, 1983, as attorney for Edwin H. Poulnot, III, also indicates that Edwin H. Poulnot, Jr. still owned 200 shares of Kerrison's stock.

While there is considerable confusion about the 1979 and 1980 transfers of stock, the transfer of E.H. Poulnot Jr.'s 200 shares can be summarized as follows, according to the stockbook. As of December 1979, E.H. Poulnot, Jr. owned 200 shares. He held two certificates, #64, representing 134 shares, and #84, representing 66 shares, on December 26, 1979, Ed Harris, an employee of Kerrison's canceled certificate #64 and issued certificates numbered 136 through 141. Certificate #137 for 119 shares was issued to E.H. Poulnot, Jr. The other five certificates, representing 3 shares each, were issued to E.H. Poulnot, III, and his immediate family members, Joan Hutchinson poulnot, Dale Poulnot Widman, David Poulnot and Gene Poulnot Riggs.

On February 4, 1980, Ed Harris, canceled certificates #84 and #137 and issued new certificates numbered 142 through 147. Certificate #142 was issued to E.H. Poulnot, Jr., for 170 shares, representing the balance of his shares after the completion of the two-stage gift transaction. Certificates numbered 143 through 147 were again issued to E.H. Poulnot, III and his four family members in the amount of 3

shares each.

The ownership of the shares remained the same until December 1983. on December 15, 1983, Ed Harris canceled certificate #142 and issued certificates numbered 148 through 158. certificates numbered 148 through 153 were delivered on December 29, 1983, to E.H. Poulnot, III and his family. Certificate #154 for 10 shares was retained by E.H. Poulnot, Jr. Subsequently on January 13, 1984,

On February 13, 1987, E.H. Poulnot, Jr. died owning 10 shares of Kerrison's stock. This 10 shares has not yet been transferred out of his estate. Mrs. Elizabeth S. Poulnot left all of her 5 shares in Kerrison's to E.H. Poulnot, III. All of the parties agree that it was the intention of Edwin H. Poulnot, Jr. to let his son, Edwin H. Poulnot, III, have a controlling interest in Kerrison's. While there are some contradictory figures, it is clear that Edwin H. Poulnot, Jr. was trying to implement an estate plan during the years beginning in 1979. The fact that the internal records of the Company contradict one another comes as no surprise to the court in view of the fact that Kerrison's was not run in the modern, technical fashion that you would expect a major department store to be run. The keeping of the stockbook appears to this court to be the one business practice that was done in a logical, orderly method. There are no facts which lead the court to believe any stock certificates were not issued in order or in the proper manner.

14. Since Fiscal Year End January 31, 1986, Kerrison's has been on a downward financial trend from which it is doubtful there can be a recovery such that Kerrison's can once again become a major department store in Charleston and South Carolina, or, for that matter a

profitable business at all. The cumulative net losses from operations are astronomical. The Company has also experienced a continuous loss in shareholder equity since 1986. Were it not for Hurricane Hugo Kerrison's would probably be out of business. Because of the insurance proceeds received after the storm and the appreciated value of its real estate holdings, however, the Company is in reasonably good financial condition in spite of its operational losses.

The problem is, Kerrison's continues to loose money despite the fact that a substantial part of the insurance proceeds from Hurricane Hugo have been used to run the Company. Edwin H. Poulnot, III's diary entry of February 18, 1991, which says "...if it hadn't been for the storm, we would all be selling apples by now" is a good indication of the kind of shape Kerrison's is in. Plaintiff's exhibit No. 169. Furthermore, Edwin H. Poulnot, III's diaries are replete with indications that the business is failing, and the officers see no way to turn the business around. Although, the word liquidation was not used, the entry on May 15, 1990, recognizes that the directors must take steps to cut more if they are to survive and that he and his daughters, "collectively don't see any solution." On July 23, 1990, Poulnot advised Anne Ross and Chris Collins, the accountants, that the future was uncertain. In spite of what appears to be a hopeless situation, however, present management has offered no sensible plan designed to turn the Company around. What feeble efforts they have made in that regard have only resulted in the loss of more money. For some reason they seem determined to stay the course even if it means the financial ruin of the Company.

CONCLUSIONS OF LAW

A.There is complete diversity of citizenship between the plaintiffs and the defendants, and the amount in controversy, exclusive of interest and costs, exceeds the sum or value of Fifty Thousand and No/100 ($50,000.00) Dollars, giving this Court jurisdiction pursuant to 28 U.S.C. § 1332.

Venue is proper in the Charleston Division of the United States District Court for the District of South Carolina, pursuant to the provisions of 28 U.S.C. § 1391.

B. Since this is a diversity action, the substantive law of the State of South Carolina must be applied. Erie Railroad Co. v. Thompkins, 304 U.S. 64 (1968)

C. In all cases involving officers, directors and controlling shareholders, these individuals, particularly in a closely-held corporation, must exercise their fiduciary responsibility toward the minority shareholders. The duties of directors, officers, and controlling shareholders are found in South Carolina statutory authority and case law.

S.C. Code Ann. §§ 32—8—300(a) and 33—80—420(a) (Law. Co—op. 1990) expressly impose duties of loyalty and due care on corporate directors and officers and make it clear that those fiduciary duties run to shareholders, such as the plaintiffs. See also, Davis v. Hamm, 387 S.E. 2d 676 (S.C. Ct. App. 1989).

Talbot v. James, 190 S.E.2d 759 (S.C. 1972) and Jacobson v. Yaschik, 155 S.E.2d 601 (S.C. 1967), hold that controlling shareholders are also fiduciaries, and, as such, answerable for breaches of fiduciary duties of loyalty and due care directly to other corporate shareholders, see also,

Alderman v. Alderman, 181 S.E. 897 (S.C. 1935); Gilbert v. McLeod Infirmary, 64 S.E.2d 524 (S.C. 1951) (utter candor is mandatory); and Black v. Simpson, 77 S.E. 1023 (S.C. 1913). The plaintiffs bear the ultimate burden of proving that the defendants breached their fiduciary duties.
Dockside Assn'n., Inc. v. Detyens, 362 S.E. 2d 874 (S.C. 1987). The duties which the plaintiffs claim the defendants have breached give rise to their desire to have the Company dissolved by this court

C. The statutory law in South Carolina provides for judicial dissolution of corporations under certain circumstances:

> The circuit courts may dissolve a corporation:
> (2)in a proceeding by a shareholder if it is established that:...
> (ii)the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder (whether in his capacity as a shareholder, director, or officer of the corporation);
> (iv)the corporate assets are being misapplied or wasted;

S.C. Code Ann. § 33-14-300 (Law. Co-op. 1990). Judicial. dissolution is a very serious remedy, however, and "[t]he court should be cautions in the application of these grounds so as to limit them to genuine abuse rather than instances of acceptable tactics in a power struggle for control of a corporation." Id. Official Comment.

D. As an alternative to corporate dissolution,

however, courts are empowered to order other alternative relief to shareholders who sue for corporate dissolution:

> (d) In any action filed by a shareholder to dissolve the corporation on the grounds enumerated in Section 33—14—300,the court may make such order or grant such relief, other than dissolution, as in its discretion is appropriate, including, without limitation, an order:
>
> (1)canceling or altering any provision contained in the articles of incorporation, or any amendment to the articles, or in the bylaws of the corporation;
>
> (2)canceling, altering, or enjoining any act or resolution of the corporation;
>
> (3)directing or prohibiting any act of the corporation or of shareholders, directors, officers, or other persons' party to the action; or
>
> (4)providing for the purchase at their fair value of shares of any shareholder; either by the corporation or by other shareholders.
>
> (e)The relief authorized in subsection (d) may be granted as an alternative to a decree of dissolution or may be granted whenever the circumstances of the case are such that the relief, but not dissolution, is appropriate.

S.C. Code Ann. § 33—14—310 (Law. Co—op. 1990)

E. S.C. Code Ann. § 33-14—300 is jurisdictional and asking for judicial dissolution under that section is merely.: a prerequisite for obtaining other forms of relief under S.C. Code Ann. § 23—14—310. See, Hendley v. Lee, 676 F.Supp.

1317, 1324 (D.S.C. 1987).

F. It is clear from the plain meaning of the statute that shareholders do not need to show facts necessitating dissolution before this court may order an alternative remedy. Id. ("The relief authorized in subsection (d) may be granted as an alternative to a decree of dissolution or may be granted whenever the circumstances of the case are such that the relief but not dissolution. is appropriate." (emphasis added); See also, Hite v Thomas & Howard Co. of Florence. Inc., 409 S.E.2d 340, 343 (S.C. 1991) (construing the broad language of § 33—14—310(e) to allow a shareholder to seek the statutory relief enumerated in subsection (d)) "Once the plaintiff shows the statute is applicable through sufficient allegations, the inquiry becomes essentially one for resolution through the familiar balancing process and flexible remedial resources of courts of equity.'" Handley, 676 F.Supp. at 1324 (quoting Meiselman v. Meiselman, 307 S.E.2d 551, 562 (N.C. 1983))

G. The plaintiffs have alleged that the defendants' conduct in this case is illegal, fraudulent, oppressive, or unfairly prejudicial to them as minority shareholders. In addition, the plaintiffs have alleged that the defendants have wasted and misapplied Kerrison · s corporate assets.

Illegal conduct refers to that conduct which is against the law. There are nine elements of fraud in South Carolina, all of which must be shown to make out a prima facie case of fraud. First State Savings & Loan v. Phelps, 385 S.E.2d 821, 824 (S.C. 1989). First, there must be a representation; second, the representation must be false; third, the representation must be material; fourth, there must be knowledge on the part of the perpetrator of the falsity or a reckless disregard of its

truth or falsity; fifth, the perpetrator must intend the representation he acted upon; sixth, the victim must not have knowledge of the falsity; seventh, the victim must rely on the: representation's truth; eighth, the victim must have the right to rely on the representation; and ninth, the victim must he injured as a proximate and consequent result of the representation. Id. In addition, fraud must be proven by clear, cogent, and convincing evidence. Id.

Oppressive conduct means conduct that is "burdensome, harsh and wrongful; a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members; or a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely." Gimpel v. Bolstein, 125 Misc. 2d 45, 50-51, 477 N.Y.S. 2d 1014, 1018 (Sup. Ct. 1984) (citations omitted). Oppressive conduct is not synonymous with fraud or illegality and can exist as a result of a continuing course of conduct, even absent mismanagement or misapplication of assets. White v. Perkins, 189 S.E.2d 315, 319 (Va. 1972). Oppressive conduct is conduct which is also unfairly prejudicial.

H. The management of Kerrison's has been handled in the same manner for many years with few, if any, complaints by anyone, until the Kreischers began discussing the sale of their stock to Edwin Poulnot, III and dissolution of the Company in May 1990. The facts are clear that the Kreischers allowed the Poulnots to run the business as they saw fit with no questions asked. This does not mean, however, that the majority shareholders of Kerrison's had a right to breach the fiduciary obligations they have to the minority, but the Kreischers must show facts sufficient

enough to prove the defendants breached their fiduciary duties and conducted the corporation in a manner such that the drastic remedy of judicial dissolution is warranted.

It is true that the poulnots have had a tremendous amount of freedom to run Kerrison's as they pleased, but Jane and Charles Kreischer had a duty as members of Kerrison's board of directors to ask questions, and participate in the business decisions of the Company, at least by way of a dissenting vote. The facts do not indicate they ever participated on the board in such a manner until 1990, shortly before this lawsuit was filed. Furthermore, all of the shareholders have a right to certain corporate information, including salaries, bonuses, and other payments, as well as corporate debts and assets. The facts also do not indicate that the minority ever actively participated or inquired into the way in which business was conducted except in a very general way.

Edwin Poulnot, III's offer to buy the stock c-f the plaintiffs in May 1990, and September 1990, was unreasonably low. The plaintiffs unquestionably had an opportunity and an obligation to investigate the corporation before they accepted the offer to buy their shares. Edwin Poulnot, III had a right to make the best deal possible for himself provided he did not violate his fiduciary duty to the plaintiffs by not making a full disclosure to them of all facts relevant to the value of their stock. The magnitude of the Hurricane Hugo insurance proceeds was one of the most critical factors in that equation and the one about which the plaintiffs could learn only from Edwin Poulnot, III who gas either carrying on personally or privy to all negotiations with the insurance carriers. Though the court cannot say that Edwin Poulnot, III violated his legal duties to the plaintiffs to

disclose Hurricane Hugo insurance information, his conduct is extremely suspicious in light of the tremendous impact those insurance proceeds had on the value of the plaintiffs' stock, and his failure to fully advise plaintiffs about the amount of the insurance settlement for a substantial period of time after he both knew the amount of the recovery and had an opportunity to inform the plaintiffs of its details. In all probability such did not violate any fiduciary duties owed by Edwin Poulnot, III to the plaintiffs. It does, however, more clearly than any other single transaction brought to the court's attention in this matter evidence the attitude on the part of the majority stockholders of Kerrison's towards the minority stockholders of that company. An attitude which, though probably legal, makes it extremely unlikely that the defendants ever intend to fairly compensate the plaintiffs for their interests in Kerrison's. As it turned out, of course, the offer to purchase the stock was not accepted by plaintiffs, and they were not harmed as a result of any lack of information on their part. They can, therefore, not make out a cause of action for fraud.

This court is likewise unconvinced that the defendants attempted to manipulate the stock in any improper way. Edwin Poulnot, Jr. was attempting to implement an estate plan which would give his stock, and control, to Edwin oulnot, III, and the parties all agree that is what he intended. The contradictory accountant's reports and letters are simply a further indication of the lack of organization with which the business was run. The stockbook is very clear, however, as to how the stock was issued.

The court also concludes that the defendants did not make any improper withdrawal of funds from the Company. It is not clear what each of the defendants employed by the

Company contributed by way of talent to the operation, and it could be argued that one or more of them have- been overcompensated. Likewise the court suspects that their job security during the Company's financial crises is somehow enhanced because of their family connection. This does not mean that they have done anything wrong or violated any duties owed to the plaintiffs or the company. They have worked hard, and the court believes they have done the best they can to make the business profitable. In addition to their salaries, the defendants also received bonuses in some profitable years, but the plaintiffs received dividends in those years, and dividends are the only returns the plaintiffs are entitled to. The defendants enjoyed some perks but nothing exorbitant or shocking, and the plaintiffs, as members of the board, were in a position to be aware of the same at the time and voice any objection thereto they might have .

As such, the plaintiffs have not met their burden of proving the defendants breached their fiduciary duties. The facts do not support any illegality, fraud, or oppression on the part of the defendants either. Likewise, the defendants have not made any representations which the plaintiffs show they relied on and were subsequently damaged as a result of. The plaintiffs also have not made out a case for oppression. Oppressive conduct is only made out if the plaintiffs can show the defendants treated them unfairly. The parties always treated each other the same until this litigation began according to the record. The plaintif fs historically chose to take an inactive role in the running of the Company, and the defendants, for obvious reasons, were eager to oblige them. While the practices which the plaintiffs claim were oppressive may have often not been good business practices, the plaintiffs cannot show they were prejudiced in any way. They got the same treatment as all of the shareholders, expect

those employed by Kerrison's. There does not appear to this court to be anything oppressive about that. The defendants conduct simply does not rise to the level that this court believes calls for the extraordinary remedy of judicial dissolution.

The plaintiffs also allege that the defendants have misapplied the assets of the Corporation. The statutory authority for the standard of conduct for directors and officers is located at S.C. Code Ann. § 33—8—300 and § 33—8—420 (Law. Co—op. 1990). This is commonly known as the business judgment rule which means a court will not substitute its judgment for that of the corporate managers where the managers act within [their] authority and [they] act without corrupt motives and in good faith. Dockside Ass., Inc. v. Detyens, 352 S.E. 2d 714, 719 (S.C. Ct. App. 1987).

The fact that Kerrison's has consistently lost money since 1986 is, unfortunately, alone not enough to warrant judicial dissolution. See S.C.Code Ann. § 33-14—300, Reporters' Comments. This court has previously determined that the individual acts of the defendants did not constitute improper conduct, and thus we need not substitute our judgment for that of those who run Kerrison's simply because Kerrison's continues to loose money. In conclusion, therefore, we determine that judicial dissolution is not proper in this case.

I. While the plaintiffs have not established their right to dissolution that does not end the matter. South Carolina clearly provides for other relief, including ordering the majority or the Company to purchase the minority's stock, where dissolution is not appropriate, S.C. Code Ann. § 33—14—310(e) (Law. Co—Op 1990), and the granting of

such alternative relief is discretionary with the court. Ward v. Ward Farms, Inc., 324 S.E. 2d 63, 283 S.C. 568 (S.C. Supreme Ct. 1984) . Our next inquiry, therefore, is whether or not, applying general equitable principles, plaintiffs are entitled to such relief.

The real property owned by Kerrison's has a value of several million dollars. Conversely, the business of Kerrison's has not made a profit in any year since 1986. It has lost several million dollars during that period of time, and the value of the plaintiffs' stock in the Company has decreased proportionately. The defendants have offered no concrete plan reasonably designed to reverse said trend. They even fail to offer any prediction or expectation that the business will improve appreciably in the future. In fact, the concerns expressed by Edwin Poulnot, III as early as 1988 about the wisdom of continuing the business under the conditions then existing were not evident at the trial of this case. The Hurricane Hugo insurance proceeds seem to have allayed those concerns even though market conditions have shown no improvement, Under the circumstances the court concludes that the value of the plaintiffs' stock in Kerrison's will continue to decline for a indeterminable period of time if this court fails to take action to prevent the same. On the other hand, payment to the plaintiff of the fair value of their stock in Kerrison's from the assets of the Company would not substantially diminish the majority stockholders' ability to carry on the operation of the business.

If the plaintiff were faced with the foregoing dilemma in a different business setting, the court would view the matter differently. If Kerrison's were a partnership or a publicly traded corporation, the plaintiffs could obtain fair value for their interests therein without court intervention. In

their present situation, however, the only remedy they have available is the one provided by equity.

An additional factor that encourages equitable relief in this case is the manner in which the plaintiffs obtained their stock. It was a gift from Jane P. Kreischer's family. The stock was not obtained by any choice exercised by the plaintiffs.

In considering the imposition of equitable relief, the court must consider the relative interest, positions and desires of the parties along with the effect that the proposed relief will have on each. The Poulnots have run Kerrison's for many years and obviously wish it to remain a going concern. The plaintiffs on the other hand do not have either the training, the experience or the desire to manage the business. The largest asset any of the parties appear to have is their interest in Kerrison's, and it is doubtful that either group, minority or majority stockholders, could afford to purchase the interest of the other group.

After giving all of these factors consideration, the court concludes that equity will not permit the wrong being suffered by the plaintiffs in this matter to continue without a remedy and that the appropriate remedy is a share purchase. Therefore the corporation shall purchase all the shares of the minority shareholders for their fair value. In order to arrive at a fair value for the plaintiffs' stock the parties shall have thirty day's from the date hereof to file with this court what they contend to be fair value of said shares, considering among other relevant evidence the going concern value of the corporation. The parties shall include a designation of all experts relied upon and their opinions. Furthermore, the parties shall specify the terms of said fair value share

purchase, including, if appropriate, terms for installment payments, subordination of the purchase obligation to the rights of the corporation's other creditors, and security for a deferred purchase price. Thereafter, the court shall permit limited discovery and schedule a hearing to determine the fair value for plaintiffs' stock, and what the terms for the purchase and delivery of the subject shares shall be,

AND IT IS SO ORDERED.

_____

C. Weston Houck
USDJ

4/25/95
Florence, South Carolina

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Jane P. Kreischer, Charles F. Kreischer, Edwin F. Kreischer, and Barbara W. Kreischer,

Plaintiffs,

vs.

The Kerrison's Dry Goods Company, Edwin H. Poulnot III, Dale Poulnot Widman, Gene Poulnot Riggs, David Lawrence Poulnot, and Joan Hutchinson Poulnot,

Defendants.

Civil Action No: 2:91-3255-2

Filed 1/29/97

Findings of Fact Conclusions of Law and Order

The defendant Kerrison Dry Goods Company (hereinafter "Kerrisons") is a family owned South Carolina corporation which has been engaged for many years in the retail mercantile business in the Charleston. South Carolina, area The plaintiffs are minority shareholders in Kerrisons, and the individual defendants are the majority shareholders. This action was instituted by the plaintiffs against the defendants in. order to judicially dissolve the corporate defendant. A trial was held in Charleston. South Carolina, from July 26, 1993, to August 12, 1993. By order filed May 1, 1995, this court refined to grant dissolution but ordered the

corporate defendant to purchase all of the shares of the plaintiffs in Kerrisons at a fair value to be determined by the court. The court then ordered a hearing to determine the fair value of said shares, and both the plaintiffs and the defendants presented evidence concerning that issue on July 6 and 7, 1995, with closing arguments on July 14, 1995. The main assets of the corporation consist of four tracts of land in the City of Charleston, three of which have buildings thereon and the fourth serves as a parking lot.

The other assets of the Corporation consist of the lease of a. store at the St. Andrews Shopping Center in Charleston, the inventory, the accounts receivable, cash, and cash equity in a life insurance policy on the life of the president In an order filed on September 27, 1995, the court determined that it could not place a value on the St. Andrews lease at that time without engaging in pure speculation It, therefore, deferred doing so until a later date. The status of that property has since changed, and its valuation will be included herein,

The court having previously determined that the corporate defendant must purchase for fair value the interest of the plaintiffs in the corporation, it must now address the question of valuation and the appropriate date on which to determine the same, The court was on the verge of signing an order disposing of those issues when the plaintiffs, beginning on February 2, 1996, filed four motions over a period of approximately three weeks alleging fraud and concealment of information on the part of the defendants concerning the value of the corporate assets. A decision in the case was, therefore, delayed until said allegations could be inquired into. A period of discovery ensued. and another hearing was held in the matter on September 10, 1996, through September 13, 1996 At that time the parties were permitted to present

whatever evidence they chose to on the issues of fraud and concealment on the part of the defendants, the fair value of Kerrisons, and the proper date of valuation.

In order to reach a fair and equitable decision in this case the court feels compelled to consider all of the evidence it has heard. The effect of that, of course, is to open the record and expand it to include the evidence received at the September 10, 1996, hearing. To that extent, the motion of the plaintiffs to open the record is granted. Otherwise, all of the plaintiffs' outstanding motions are denied. Their claim that the defendants were somehow guilty of fraud or concealment of material facts is without merit

After giving the evidence, briefs of counsel and the applicable law careful consideration, this court hereby makes the following Findings of Fact, Conclusions of Law and Order pursuant to Rule 52 of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

1. At the time of the institution of this action and at all times thereafter all plaintiffs were residents and citizens of some state other than South Carolina, and all defendants were residents and citizens of the State of South Carolina, and the matter in controversy exceeded the jurisdictional amount.

2. There is very little authority available concerning the appropriate date of valuation in a court ordered purchase such as this. "In cases of minority stockholder oppression, the date of ouster seems appropriately used." Hendley v. Lee 676 F. Supp. 1317, 1327 (D.S.C. 1987). In cases brought pursuant to dissenters' rights statutes many states require that the

valuation be made either the day before the event that triggered the dissenters' rights or immediately before the effective date of the action that the majority approved. Harry J. Haynsworth. IV, Valuation of Business Interests, 33 Mercer L. Rev. 457, 508 (1982). In the instant case the court is simply guided by the understanding that " the ultimate issue is what is fair between the parties in each case." Id.

Kerrisons was established in the 1830's. and the family of the plaintiffs and the individual defendants acquired an ownership interest therein in the 1920's. For many years the business was very successful. It has not, however, realized a profit since its fiscal year ending on January 31, 1986. Before Hurricane Hugo struck Charleston on September 22, 1989, the defendants were seriously considering closing the business. The receipt of substantial insurance proceeds because of the storm caused them to reconsider that decision, and they decided to keep the business open in an effort to turn it around. That was a very unwise course of action as Kerrisons has continued to suffer massive losses, There is, however, nothing to suggest that the defendants acted improperly or were guided by any ulterior motive in keeping the business open for such a long period of time. The defendant Edwin H. Poulnot, III, the president of the company. explained in his testimony that the business had suffered through many bad times in the past and always rebounded. He thought the same would occur again, but he was wrong.

This action was filed on October 28, 1991, and the plaintiffs ask the court to adopt that as the date of valuation. It is also argued that the appropriate date is the time of the trial on the merits, the date of the court's order deciding the case on the merits, or when the valuation hearings were held.

The court has considered all of the arguments made in the light of all of the existing circumstances. It is impossible to choose a time that does not favor one side and disfavor the other. The most logical and fairest date on which to value the corporation for the purposes of this lawsuit is that on which the court ordered Kerrisons to pay fair value for the minority interest of the plaintiffs in the company. The court, therefore, selects May 1, 1995 as the appropriate date of valuation. The record made at the hearing which commenced on September 10, 1996, will, therefore, not be relied upon herein for the valuation of any corporate property except the St. Andrews lease.

3. The real property owned by Kerrisons consists of four tracts of land located in Charleston. At the hearing held July 6, 1995, and July 7, 1995, the plaintiffs and the defendants presented evidence as tote value of said property.

The plaintiffs called Frank Daniel Batten. III, a Charleston real estate agent, as a witness, and the defendants presented the testimony of Stephen C. Attaway, MAI appraiser. Mr. Batten testified only as to the value of the main Kerrisons building at 260 King Street, He valued the same as follows:

260 King Street. (lst floor)	$2,63 8,149
260 King Street - (2nd,3rd, 4th Floor)	$ 360.000
Total value	$2,998,149

Mr. Attaway made full appraisals of all of Kerrisons real property as of May 18, 1995,' He testified as to the following values:

260 King Street	$1,850,000

Wentworth Street parking lot	$1 1,200,000
256 King Street	$ 270,000
254 King Skeet	$ 480,000
Total value	$3,800,000

The plaintiffs do not contest the May 1995 Attaway appraisal as to any property other than 260 King Street. In determining the value of 260 King Street to be $1,850,000, Attaway established and considered values under the cost, market and income approaches.fn2 Ultimately, he concluded that the market approach was the most appropriate method for valuation wit some consideration being given to the income approach.

In placing a value on the corporate real estate the court has carefully weighed the testimony of Mr. Batten and Mr. Attaway, Mr. Batten is a prominent, highly respected Charleston realtor. He is not, however, a real estate apopraiser and so testified, In fact, he went so far as to say that his testimony should not be considered a real estate appraisal, In addition, he timed his opinion as to value without even inspecting the property. He valued the property using an income approach, and his comparables included the most expensive retail space in downtown Charleston. Mr. Attaway is of course, an MAI appraiser who is thoroughly familiar with the Charleston market His qualifications as well as the methods and reasoning used by him in reaching his conclusion, convinces the court that the values assigned to the real estate by Mr. Attaway are fair. reasonable and appropriate, The court, therefore, finds tat the fair market value of the real estate owned by Kerrisons was $3,800,000 on May 1, 1995.

4. At the September 10, 1996, hearing Stephen C. Attaway testified as to the present value of the St. Andrews

lease. Based thereon the court finds that the same has a fair value of $125,000.00,

5. The plaintiffs retained Dr. Oliver G. Woods, Jr., a consulting economist, and the defendants employed Fzancis A. Humphries, a certified public accountant, to ascertain the value of Kerrisons, Dr. Woods used the internally generated financial statements of Kerrisons to make his calculations. He utilized an adjusted book value method to determine the value of the entire company. He started with the value of the company for the period ending January 31, 1995, and made adjustments to the real estate based on the May 1995 appraisal of Stephen C. Attaway. Under his analysis the total value of Kerrisons is $2,715,477, Dr. Woods did not offer any testimony as to a liquidation value of the company. Additionally, Dr. Woods did not include any income tax consequences as a factor in his valuation.fn3

Mr. Humnphries started with the book value of the company as of April 30, 1995, ($389,950) and made fair market adjustments including valuing the real estate to agree with the May 1995 Attaway appraisal. In determining the adjusted book value to be $2,518,703fn4, Mr. Humphries also made an adjustment of $1,161,863 for income taxes, He testified that tax consequences were not speculative and must be considered in fairly determining the value of the business. After considering adjusted book value and a liquidation value derived from the adjusted book value, Mr. Humphries concluded that the more appropriate method for determining the fair market value of Kerrisons is the adjusted book value method.

The tax consequences are not speculative and are an appropriate factor to be considered in valuing this business.

Santos Oil Company, Inc. v Cox, 217 S.E.2d 789, 792 (S.C. 1975). Therefore, after examining the valuations submitted by the parties and the testimony of the experts, the court finds that the total adjusted book value of the stock of the entire corporation is $2,518,703.

6. The final step in valuing a particular interest in a. business is to take into account the various discounts. Harry J. Haynsworth, IV, Valuation of Business Interests, 33 Mercer L. Rev. 437, 488 (1982). The plaintiffs are in a minority position with only 27.963% (151/450 shares) of the Kerrisons stock and their ownership interest is not easily marketable because of the inherent difficulty in selling such interests in closely held corporations. For these reasons, Mr. Humphries testified that a 35% minority discount and a 25% lack of marketability discount were appropriate in valuing the plaintiffs' interest. Dr. Woods did not include any discounts in his valuation of the plaintiffs' interests.

In determining the fair value of the minority interest, the court must determine whether a minority discount and a lack of marketability discount should apply. Both experts in this case agree that a minority discount is generally applicable when valuing a minority interest. Dr. Woods is of the opinion, however, that the discount should not be applied here because this case involves an "insider" transaction as opposed to one between a willing buyer and a willing seller, Mr. Humphries, on the other hand, opined that both discounts are applicable and should be applied to reduce the value of the plaintiffs' interest.

Interests in a closely held business generally cannot readily be sold and are less valuable than equivalent interests in companies whose stock is easily traded on the open

market. Haynsworth at 489. An astute investor will pay less for interests that cannot be freely traded, and the discount to compensate for this reduced liquidity is well established. Id.

"The minority discount is appropriate only when the shareholder in a closely held corporation does not actually have the voting power to control the management of the corporation." Id. at 494. The possibility of a minority stockholder in a closely held corporation ever acquiring control or having any voice in the management of the company is highly improbable. South Carolina Nat'l v. McLeod, 256 F. Supp. 913, 928 (D.S.C. 1966). The essence of the minority discount is the inability to have control, Haynsworth at 496.

The plaintiffs analogize this case to dissenters' rights cases and argue tat the discounts should not apply. This case does not involve dissenters' rights, nevertheless, the same principles that make it inappropriate to impose discounts in dissenters' rights cases or in cases where the minority has been improperly squeezed out apply to this court ordered purchase Additionally, the lack of marketability discount is inappropriate with respect to an "intra-family" transfer in a closely held corporation Id. n. 92; See also Morrow v. Martschink Civil Action Number 2:95-0552-18 (D.S.C. September 21, 1995). "In family business, the members do not want outsiders to have ownership interests. Thus, the lack of marketability can actually enhance the value of the stock..." Id. Moreover, in a forced sale situation the normally applied discounts should not be imposed. Hendley, 676 F. Supp. at 1330 (citing Haynsworth at 459). "Discounts properly apply to the total value of the company in a 'willing buyer/willing seller' context, but do not apply at all when neither party is willing and the transaction is between insiders." Id.

The ultimate issue is what is fair and equitable in determining the fair value of the interest subj ect to the buy-out. The court concludes that no minority discount or lack of inarketability discount should be used in calculating the value of the plaintiffs' shares. The application of the discounts would, in effect, compensate the defendants as if they had paid a premium for their own inherited stock See Morrow v. Martschink Civil Action Number 2:95-0552-18 (D.S.C. September 21, 1995.) Accordingly, the court finds that no discounts should be used in determining the fair value of the plaintiffs' shares.

CONCLUSIONS OF LAW

A. There is complete diversity of citizenship between the plaintiffs and the defendants, and the amount in controversy, exclusive of interest and costs, exceeds the sum or value of Fifty Thousand and No/100 ($50,000.00) Dollars, giving this court jurisdiction pursuant to 28 U.S.C. § 1332,

B. Since this is a diversity action, the substantive law of the State of South Carolina must be applied. Erie Railroad Co. v Tompkins, 304 U.S. 64 (1968).

C. The sole issue for determination herein is the fair value of the interest of plaintiffs in Kerrisons, S.C. Code Ann. § 33-14-3 10 (d) (4). In this context fair value has been said to mean "instrinsic value". Santee Oil Company I

D. The greater weight or the preponderance of the evidence establishes that the fair value of the plaintiffs' 27.963% interest in Kerrisons is the sum of $704,306.31. It is therefore, ordered that the defendant corporation shall within 120 days of this order tender to the plaintiffs the fair value as

set forth herein together with interest at the statutory rate from the filing of this order, It is further ordered that the plaintiffs shall upon receipt thereof transfer their shares of Kerrisons stock to the defendant corporation free of any encumbrances or liens.

AND IT IS SO ORDERED

C. Weston Houck
Chief United States District Judge

January 28, 1997
Florence, South Carolina

Footnotes

fn1No testimony or argument has been made that the values assigned to the real estate by Mr. Attaway as of May 18, 1995, were any different on May 1, 1995, and the court will consider the values to be the same.

fn2The values under the different valuation methods included in the Attaway appraisal for 260 King Street are as follows: cost approach. $ 1,750,000; market approach - $1,860,000; and income approach - $ 1,780,000.

fn3The testimony also indicates that Dr. Woods may not have included or had available to him all the pertinent informnation. i.e. the Fuller judgment. Dr. Woods testified that his valuation originated with Kerrisons' "internally generated" financial statements. In addition, the testimony indicates that information concerning Department Stores,

Inc., a wholly owned subsidiary of Kerrisons, was not included in those statements. Consequently, at closing arguments the plaintiffs submitted an exhibit utilizing the adjusted book value computed by Mr. Humphries.

fn4Actually, Mr. Humphries determined the adjusted book value of Kerrisons to be $2,448,792, but that computation was arrived at by placing a value of $55,089 on the St. Andrews lease. Since we herein value the same at $125,000, his figure is adjusted upward to reflect the greater value.

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Jane P. Kreischer, Charles F. Kreischer, Edwin F. Kreischer, and Barbara W. Kreischer,

Plaintiffs,

vs.

The Kerrison's Dry Goods Company, Edwin H. Poulnot III, Dale Poulnot Widman, Gene Poulnot Riggs, David Lawrence Poulnot, and Joan Hutchinson Poulnot,

Defendants.

Civil Action No: 2:91-3255-2

Filed 5/12/97

Order

The defendant Kerrison Dry Goods Company (hereinafter referred to as "Kerrisons" or "corporate defendant") is a family owned South Carolina corporation which has been engaged for many years in the retail mercantile business in the Charleston, South Carolina, area, The plaintiffs are minority shareholders in Kerrisons, and the individual defendants are the majority shareholders. This action was instituted by the plaintiffs against the defendants in order to judicially dissolve the corporate defendant A trial was held in Charleston, South Carolina, from July 26, 1993. to August 12, 1993. By order

filed May 1, 1995, this court refined to grant dissolution but ordered the corporate defendant to purchase all of the plaintiffs' shares in Kerrisons at a fair value to be determined by the court. After additional discovery and another trial the court on January 29, 1997, ordered the corporate defendant to purchase all of the plaintiffs' shares of stock for $704,306.31.

The ease is now back before the court on the motion of the defendants to alter or amend the court's judgment of January 29, 1997.

The defendants' motion moves, inter alia, that the court amend its judgment by ordering the corporate defendant to purchase or pay fair value for the ten (10) shares of the defendant corporation which are currently under the legal title of the Estate of Edwin H. Poulnot, Jr., (hereinafter referred to as "Estate").fn1 The court held a hearing on the matter on April 17, 1997. The defendants argued that the court's orders of May!, 1995 and January 29, 1997, intended that the defendants purchase all of the plaintiffs' interest in the defendant corporation, and therefore, tat the ten (10) shares that Jane Kreischer has a beneficial interest in should necessarily be included in the purchase. The plaintiffs opposed any amendment to the judgment because they claimed that the ten (10) shares were not a part of the valuation proceedings.

The issue of ownership of the ten (10) shares was brought to the court's attention early in the case albeit in a different context On October 29, 1992, the defendants made a motion to dismiss the action for lack of diversity jurisdiction. The court considered the motion at a hearing on February 12, 1993. The defendants' position was that it was necessary for Charles Kreischer, a plaintiff, and a trustee/co-executor of the

Estate, to represent all of his interests in the action at one time. They argued that as an executor, Charles takes on the South Carolina citizenship of the deceased thereby destroying diversity among the parties. See Title 28 U.S.C. 1332 (c)(2). At that hearing the defendants stated that the Last Will and Testament of Edwin H. Poulnot, Jr., (hereinafter referred to as "Will") bequeathed the income from the ten (10) shares to Mr. Poulnot's daughter the plaintiff Jane P. Kreischer, for her life and after her death to her two children for life with the remaind interest going to his grandchildren. Although the plaintiffs agreed with the defendant understanding of the disposition of the income from the shares, they argued that the same was of consequence because they were not making any claim against the Estate, Both parties agreed th the Estate had legal title of die shares.

After considering the parties arguments the court found that Charles Kreischer was suing in his individual capacity as a shareholder and that it was unnecessary for the court to read into his presence as a plaintiff the fact that he is also a cc-executor of the Estate. The court also conclude, that full relief could be obtained between the parties as they were presently constituted and that the Estate was not an indispensable party. The court noted that it was for the Probate Court to determine the terms of the Will. The court, therefore, denied the defendants' motion to dismiss for lack of diversity jurisdiction, See Transcript of Motion Hearing filed on February 12, 1993.

Thereafter, the action was tried front July 26, 1993 to August 12, 1993. At that trial neither party contested the Ownership of the ten (10) shares in the Estate. Following the trial, the court issued an order on May 1, 1995, which found that the corporate defendant had 540 shares of outstanding

stock with the defendants owning 379 shares, the plaintiffs Owning 151 shares, and with ten (10) shares in the Estate, The court did not make a finding of fact or conclusion of law as to which parties had any beneficial interest in the Estate's shares, The court ordered the defendant corporation to purchase all of the plaintiff's shares in Kerrisons at a fair value to be determined by the court. This order did not include the ten (10) shares in the Estate.

A valuation trial was held on July 6, 7 and 14, 1995, at which both parties presented evidence concerning the value of the shares, Prior to a decision being rendered in the case, the plaintiffs filed several motions alleging fraud and concealment on the part of the defendants concerning the value of the corporate assets. After further discovery took place, a final valuation hearing was held on September 10, 1996, through September 13, 1996. At that time the parties were permitted to present whatever evidence they chose to on issues of fraud and concealment on the part of the defendants, the fair value of Kerrisons, and the proper date of valuation. At no time during the July 1995 hearing or the September 1996 hearing, did either party offer any evidence regarding the ten (10) shares in the Estate or even make any suggestion that those shares should be purchased by the defendants.

Thereafter, the court issued an order on January 29, 1997, which stated that the defendants were to purchase the plaintiffs' 151 shares of stock, In determining the value of the corporation the court considered all of the experts fn3 testimony as to value, tax consequences of a sale, and any discounts that might apply. Once the court concluded that the value of the corporation was $2,5 18,703. it simply divided the number of total shares (540) into that number and came up with a per share price of $4,664,28. The court then

multiplied the plaintiffs' shares (151) by the share price number to get a sum of $704, 306.31. The court never considered that Jane Kreischer owned an interest in the ten (10) shares in the Estate, and no evidence was offered on that issue. Those shares were not, therefore, included in calculating the purchase price.

Under the circumstances the court does not believe that it is appropriate to grant the remaining portion of the motion of the defendants fn2 The motion to alter or amend the court's judgment of January 29, 1997 is, therefore, denied.

AND IT IS SO ORDERED.

_____

C. Weston Houck
Chief United States Judge

May 9, 1997
Florence, South Carolina

Footnotes

fn1 Mr. Poulnot died on February 13, 1987, owning ten shares of stock in the corporate defendant

fn2 On April 17, 1997, the court disposed of the other portions of the motion of the defendants.

No. 97-1230, No. 97-1800

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JANE P. KREISCHER; CHARLES F. KREISCHER; EDWIN F. KREISCHER; BARBARA W. KREISCHER,
Plaintiffs-Appellants,

v.

THE KERRISON DRY GOODS COMPANY; EDWIN H. POULNOT, III; DALE WIDMAN; GENE POULNOT RIGGS; DAVID LAWRENCE POULNOT; JOAN HUTCHINSON POULNOT,
Defendants-Appellees.

JANE P. KREISCHER; CHARLES F. KREISCHER; EDWIN F. KREISCHER; BARBARA W. KREISCHER,
Plaintiffs-Appellees,

v.

THE KERRISON DRY GOODS COMPANY; EDWIN H. POULNOT, III; DALE WIDMAN; GENE POULNOT RIGGS; DAVID LAWRENCE POULNOT; JOAN HUTCHINSON POULNOT,
Defendants-Appellants.

Filed 2/22/99

ORDER

Appellants' have filed a petition for rehearing. The Court

denies the petition for rehearing.

For the Court - By Direction

/s/ Patricia S. Connor
Clerk

§ 33-8-300 General standards for directors.

(a) A director shall discharge his duties as a director, including his duties as a member of a committee:

(1) in good faith;

(2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) in a manner he reasonably believes to be in the best interests of the corporation and its shareholders.

(b) In discharging his duties a director is entitled to rely on information opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(1) one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

(2) legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the persons professional or expert competence; or

(3) a committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence.

(c) A director is not acting in good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

(d) A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section.

(e) An action against a director for failure to perform the duties imposed by this section must be commenced within three years after the cause of action has accrued, or within two years after the time when the cause of action is discovered, or should reasonably have been discovered, whichever sooner occurs. This limitations period does not apply to breaches of duty which have been concealed fraudulently.

§ 33-8-420. Standards of conduct for officers.

(a) An officer with discretionary authority shall discharge his duties under that authority:

(1) in good faith;

(2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) in a manner he reasonably believes to be in the best interests of the corporation and its shareholders.

(b) In discharging his duties an officer is entitled to rely on information. opinions, reports, or statements. including financial statements and other financial data, if prepared or presented by:

(1) one or more officers or employees of the corporation whom the officer reasonably believes to be reliable and competent in the matters presented; or

(2) legal counsel, public accountants, or other persons as to matters the officer reasonably believes are within the person's professional or expert competence.

(c) An officer is not acting in good faith if he has knowledge concerning the matter in question that makes

reliance otherwise permitted by subsection (b) unwarranted.

(d) An officer is not liable for any action taken as an officer, or any failure to take any action, if he performed the duties of his office in compliance with this section.

(e) An action against an officer for failure to perform the duties imposed by this section must be commenced within three years after the cause of action has accrued, or within two years after the time when the cause of action is discovered, or should reasonably have been discovered, whichever sooner occurs. This limitations period does not apply to breaches of duty which have been concealed fraudulently.